Supreme Court, U.S.
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Supreme Court of the United States

October 1995 Term

Jack Hilton Hocker,
Petitioner,

v.

Department of Transportation,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

Petition for Writ of Certiorari

Jack Hilton Hocker, *pro se*
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102 pp

Questions Presented

1. Does the U.S. Court of Appeals for the Federal Circuit have jurisdiction in a case involving discrimination where the petitioner did not abandon the discrimination claims during administrative proceedings or eschew any judicial challenge of the administrative ruling on that issue and where the petitioner has filed a timely complaint in the district court on the discrimination allegation and so informed the appeals court of this disposition within the initial brief on the petition?

2. If the U.S. Court of Appeals for the Federal Circuit has jurisdiction in this case, can the court, absent of any evidence of conflect with the law, of conflect with the language or terms of a settlement agreement or of change in conditions subsequent to the formation of the agreement and not covered by the agreement, establish the intentions of the parties at the time of agreement formation by accepting subsequent contentions in lieu of the plain clear and unamigious language of the agreement and give effect to these contentions instead of the undisputed language and terms of the agreement?

3. If the the U.S. Court of Appeals for the Federal Circuit can ignor the language of a fairly made settlement agreement, can it, without evidence authorizing it to be done, annul the agreement to permit interpolation of terms and conditions into the agreement which have not been stipulated to by the parties or import words into a contract which would make it materially different in a vital particular from what it was when the agreement was formed - in other words, make a new contract?

Parties to the Proceeding

The caption to this case contains the names of all the parties to the proceeding in the United States Court of Appeals for the Federal Circuit.

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Jurisdictional Statement

The petitioner seeks review under the provisions of 28 U.S.C. § 1254 (a)(1) of a judgement filed in the U.S. Court of Appeals for the Federal Circuit and entered on August 14, 1995. A petition for rehearing was filed by the petitioner and by order was denied on September 11, 1995.

Provisions Involved

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, · · · ·, to Controversies to which the United States shall be a Party; · · · ·. The Constitution of the United States, Article III, Section 2, subsection 1.

No person shall be · · · · deprived of · · · property without due process of law; · · · ·. The Constitution of the United States, Amendment V.

In suits at common law, · · · · , the right of trial by jury shall be preserved, · · · ·. The Constitution of the United States, Amendment VII.

5 U.S.C. § 2302(b)(1)

5 U.S.C. § 2302(b)(9)

An employee, ···, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. 5 U.S.C. § 7701.

5 U.S.C. § 7701(c)(1)(B)

5 U.S.C. § 7701(c)(2)(B)

5 U.S.C. § 7701(e)(1)(A).

5 U.S.C. § 7701(f)(2).

5 U.S.C. § 7701(g)(1)

5 U.S.C. § 7701(g)(2)

· · · ·, in the case of any employee · · · who has been affected by an action which the empployee · · · may appeal to the Merit Systems Protection Board, and alleges that a basis for the action was discrimination prohibited by · · · · section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) · · · · the Board shall, within 120 days of the filing of the appeal. decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section. 5 U.S.C. §§ 7702(a)(1)(A), 7702(a)(1)(B)(iii), 7702(a)(2)(A), 7702(a)(2)(B), 7702(a)(3)(A), 7702(a)(3)(B).

5 U.S.C. § 7703(a)

5 U.S.C. § 7703(b)(1)

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42 U.S.C. § 1981a(a)(3), as amended

42 U.S.C. § 1981a(b)(3) as amended

Civil Rights Act of 1964, § 717(c) as amended 42 U.S.C.A. § 2000e-16(c).

Statement of the Case

The petitioner, Jack H. Hocker, an employee of the Department of Transportation, Federal Aviation Administration, was terminated from his employment with that agency as an Aviation Safety Inspector on April 5, 1991, allegedly for failure to meet the medical requirements for that position. The petitioner timely appealed his termination in accordance with 5 C.F.R. § 1201.22, 5 U.S.C. § 7701 (a) and 5 U.S.C. § 7702 (a), asserting an affirmative defense of handicap discrimination -- the first appeal. (See Appellant's July 7, 1992 Motion for Enforcement of Board's Order, pg. A-33.)

An administrative judge reversed the agency's action in an initial decision on December 19, 1991 (December Decision). In his decision, the judge found that the removal was the result of prohibited discrimination on the basis of the petitioner's perceived handicapping condition. The decision was not appealed and became final on January 23, 1992. (See December Decision, dated December 19, 1991, pgs. A-14 and A-19.)

Subsequent to the December Decision, the agency failed to comply with the decision by either restoring the petitioner to the same or a substantially equivalent position to that from which he was removed or, as a minimum requirement, conducting a sufficient feasibility study establishing why the petitioner's handicapping condition could not be accommodated to restored him to that position. As provided by 5 C.F.R. § 1201.182, 5 U.S.C. § 7701 (a) and 5 U.S.C. § 7702 (a), on July 7, 1992, (July Motion) the petitioner filed a petition to enforce the Board's

December Decision -- the second appeal. (See July Motion, pgs. A-24 - A-33. See also, October 23, 1992 Initial Decision, pgs. A-35 & -36).

During enforcement proceedings, the petitioner, at the behest of the judge, agreed to have the petitions for enforcement dismissed as moot in exchange for agency's submission of a new feasibility study and other materials. The enforcement action was "dismissed as moot" on October 23, 1992 (October Decision). (See October Decision, pg. A-36.)

Subsequent to the October Decision, the agency continued to assign the petitioner to clerical duties and prohibit the petitioner from returning to the same or a substantially equivalent position to that from which he was removed. Furthermore, the alternative feasibility study submitted by the agency on December 7, 1992, failed to comply with either the December or October Decision guidelines. On January 7, 1993, in accordance with 5 C.F.R. § 1201.182, 5 U.S.C. § 7701 (a) and 5 U.S.C. § 7702 (a), the petitioner filed a second petition for enforcement of the December Decision (January Motion). This petition claimed that the agency's alternative feasibility study was insufficient, alleged discrimination as per 5 U.S.C. 2302(b)(1) and reprisal as per 5 U.S.C. 2302(b)(9) and declared claims for compensatory damages, as entitled by the Civil Rights Act of 1991, 42 U.S.C. § 1981a (a)(2) (Supp. IV 1992) (CRA), for the discrimination served upon him by the agency -- the third appeal. (See April 16, 1993 Recommended Decision, pg. A-49).

In a recommended decision dated April 16, 1993 (Recommended Decision), the administrative judge found the agency's feasibility study inadequate. As a consequence, he found the agency in non-compliance with the December Decision but denied the petitioner's claims to damages and rejected the allegations of reprisal. (See July 12, 1994 Opinion and Order, pg. A-68. See also, Recommended Decision, pgs. A-52 -- A-55). Accordingly, the petitioner appealed this decision to the Merit Systems Protection Board (MSPB) on May 20, 1993.

The petitioner was restored to the position in question on April 29, 1993 and the agency submitted evidence of this reinstatement to the MSPB. Based upon this evidence of compliance, the Board,

in an Opinion and Order dated July 12, 1994 (July Opinion), reversed the administrative judge's finding of non-compliance. Furthermore, the Board reversed the Recommended Decision regarding the petitioners claim to damages and found that each of the appeals above was a separate and severable act of discrimination and failure to accomodate petitioner's handicapping condition. (See July Opinion, pgs. A-64, & A-67 -- A-71.)

The Board remanded to the Regional Office the claim to damages in the third appeal for determinations in accordance with the July Opinion but dismissed the petitioner's claims to damages for the first and second appeals. (See July Opinion, pgs. A-67 -- A-71.) However, before these determinations could be made, the parties submitted a settlement agreement to the administrative judge. (See Settlement Agreement, pgs. A-77 & -78.)

On September 26, 1994 the judge issued an initial decision (September Decision) dismissing the petitioner's appeal. The judge found *inter alia* that the parties had reached an agreement on the matter before him. (See September Decision, pg. A-74.)

As noted *supra*, the petitioner alleged that his removal and reassignment by the agency after reinstatement and the agency's failure to accommodate his handicapping condition were based upon prohibited discrimination as noted in 5 U.S.C. §§ 2302 (b)(1) and 7702 (a)(1)(B). (See July Motion, pg. A-33. See also July Opinion, pg. A-62.) The September Decision, as well as the December Decision, did not reflect jurisdiction under 5 U.S.C. § 7702 (a). (See Initial Decision, pg. A-2. See also, September Decision, pg. A-73.) Further, the September Decision instructed the parties that judicial appeals of the decisions were to be directed only to the U.S. Court of Appeals for the Federal Circuit. (See Initial Decision, pg. A-23. See also, September Decision, pgs. A-76.) The decision became final on October 31, 1994.

In accordance with the September Decision instructions and 5 U.S.C. § 7703(a), the petitioner timely filed a pro se petition for review of the Board's decision in this case with the Federal Circuit on November 29, 1994.

On August 14, 1995, the Court of Appeals for the Federal Circuit affirmed the Board's September Decision and dismissed the petitioner's Petition for Review(August Decision). (See August Decision, pgs. A-75 -- A-78.) The petitioner timely filed a Petition for Rehearing. On September 11, 1995, the Court of Appeals denied the Petition for Rehearing.

Argument

The petitioner appeals to the Court for a Writ of Certiorari. The Court should find that the U.S. Court of Appeals for the Federal Circuit decided this case contrary to the evidence on the record and the law. Furthermore, the court of appeals did not have jurisdiction in this case. As a consequence, the appeals court decision should be declared void and set aside.

The appeals court decision in this case is without jurisdiction.

Throughout the administrative proceedings in this case, the petitioner maintained claims that the agency actions against him were motivated by discrimination. At no time during this process were these claims withdrawn. The claims of discrimination were maintained in the brief that the petitioner filed with the U.S. Court of Appeals for the Federal Circuit on May 10, 1995 (herein after referred to as - the May Brief). The petitioner did not eschew any judicial challenge of the administrative rulings on the issues of discrimination in this case. Further, the petitioner advised the court within the May Brief that he had filed a timely complaint in the district court on the discrimination claims and that the proceedings pertaining to the complaint were in abeyance pending developments with the petition before the appeals court.

As defined by 5 U.S.C. 77O3(b), this case is a mixed case. It is well established that the proper judicial form for a mixed case is in the federal district court. *Williams* v. *Department of the Army*, 715 F.2d 1485 (Fed. Cir 1983); *Wiggins* v. *Postal Service*, 653

F.2d 219 (5th Cir. 1981); *Christo* v. *MSPB*, 667 F.2d 882, 29 FEP Cases 1012 (10th Cir. 1982); *Hayes* v. *United States*, 684 F.2d 137 (D.C. Cir. 1982).

The petitioner contends that the court of appeals has entered a decision which is in conflict with its own controlling precedent on this important matter as well as the decisions of other court's of appeal on this same matter. The decision in this case has departed so far from the accepted and usual course of judicial proceedings that it cries for the exercise of the Court's supervisory power.

The appeals court decision lacks a basis in fact and law.

The appeals court decision is not only lacking a basis for jurisdiction but it is also lacking a basis in fact and the law. In its decision to affirm and dismiss, the court panel cited *Greco* v. *Department of the Army*, 852 F.2d 558 (Fed. Cir. 1988) as its basis in the law for the decision. *Greco*: 1) is immaterial and irrelevant to this case; 2) has no effect on this case; and, 3) does not provide a basis for overruling the Boards finding of the parties' intent for making the agreement

Greco is immaterial and irrelevant to this case. *Greco* involved only one appeal. Whereas this case embodied three appeals. Unlike *Greco*, the agreement in this case did not have to be construed to cover subsequent uncontemplated events. The agreement was crafted in plane, simple and unambiguous language with the intent to cover what was contemplated, settlement of the third appeal, the matter on remand, and preservation of pre-existing claims and rights - not with the clear intent of resolving the entire dispute. *Id.*, 560 and 561. (See Court of Appeals August 14, 1995 Decision, pg. A-77.)

Greco has no effect upon this case. *Greco* is just an interpretation of the *Greco* settlement agreement and nothing more. *Id.*, 562.

Without substantiation, the appeals court decision overrules the Board's findings of fact and disregards the settlement agreement language.

Lastly, in the September Decision, the administrative judge, the "trier of fact", found *inter alia* that "[t]he parties ···· reached a settlement agreement resolving the matter [on remand]". (See September Decision, pg. A-70.) This is in conflict with and overruled by the August 14, 1995 Appeals Court Decision (August Decision) where the appeals court found that "···· the parties reached an agreement with the intent to resolve the dispute." *Greco,* 852 F.2d at 561. . (See August Decision, pg. A-77.) *Greco* does noting to distinguish the appeals court findings or to resolve this conflict. As required by 5 U.S.C. § 7703(c), the appeals court does not provide any further evidence to support its overruling conclusion. On the other hand, as discussed *infra,* the language of the settlement agreement does distinguish the finding of the administrative judge. In view of the Board's decision regarding the merits of the issues associated with the other two appeals, it is not unreasonable that the parties intended to end their dispute as to liability in the third appeal, but to allow the courts to resolve the unsettled issues in the remaining appeals.

In addition to the conflicts in interpretation of the agreement terms above, there is conflict between the findings of the "trier of fact" and the appeals court subject to the parties' intentions for reaching a settlement agreement. In the September Decision, the administrative judge found *inter alia* that "[t]he parties ···· reached a settlement agreement resolving the matter [on remand]"; whereas the appeals court decision found that "· · · · · the parties reached an agreement with the intent to resolve the dispute".

The terms of the settlement agreement refer to "the above referenced appeal" within the header paragraph and to "the above-captioned appeal" within the second provision of the agreement. These two phrases apply to Docket No. SF0752910971B1, the caption located at the top of the agreement. (See Settlement Agreement, pg. A-73.) The "B1" suffix within the docket number denotes a MSPB remand proceeding and pertains to the third appealable action, the agency's prohibited personnel practice (involuntary reassignment, due to handicap discrimination, to an unclassified position with duties and responsibilities inconsistent with employee's grade level).

Another fact distinguishing the administrative judge's finding is the absence within the settlement agreement, unlike *Greco,* of a merger clause waiving all pre-existing claims and rights. *Id.*, 560. Notably the settlement agreement in this case contains a clause preserving these claims and rights - " · · · · · waives all claims · · · and all rights · · · which arise out of the Appellant's Motion for Enforcement dated January 7, 1993 · · · · ·." (emphasis added). In other words, if a claim or right did not arise out of the January Motion, it is not waived. Accordingly, the claims and rights arising out of the April 1991 initial appeal to the Merit Systems Protection Board (first appeal) and the July 7, 1992 Motion for Enforcement (second appeal) are preserved and remain subject to judicial review.

The appeals court decision is in conflect with relevant decisions.

The August Decision, as noted *supra,* is not only lacking justification in fact and the law but it is also contrary to the law. In its August 14, 1995, decision (August Decision), the appeals court interpreted through its review of the settlement agreement that the parties' collective intent was to end the dispute. No analysis to support this interpretation was disclosed in the decision. The only evidence within the record of this intention was the respondent's subjective contention submitted subsequent to the making of the agreement in the respondent's reply brief to the appeals court. As discussed *supra,* the parties' intent at the making of the agreement was to resolve the matter on remand and preserve pre-existing claims and rights.

The August Decision has decided important federal questions reqarding effectuating and carrying-out contracts in a way that conflicts with relevant decisions of the United States Supreme Court, the United States Court of Appeals for the Federal Circuit and the Federal Circuit's predecessor, the United States Court of Claims.

> "[A] court will not bind parties to conditions or obligations to which they have not bound themselves according to a fair interpretation of their contract."

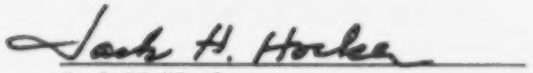
McMicken v. *Webb*, 47 U.S. 292, 297, 6 How. 292, 12 L.Ed. 443. "[T]he whole of an instrument is to be looked at to determine the effect of each part of it[.]" *Neilson* v. *Lagow*, 53 U.S. 98, 109, 12 How. 98, 13 L.Ed. 909. "It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect; and no strained or artificial rule of construction is to be applied to any part of it." *In re. Binghamton Bridge*, 70 U.S. 51, 74, 3 Wall. 51, 18 L.Ed. 137. "When provisions in a contract are clear and fit the case, they should be given their plain and ordinary meaning." *A-Transport Northwest Co., Inc.* v. *United States* 36 F.2d 1576, 1584 (Fed.Cir. 1994) (citing *Triax-Pacific* v. *Stone*, 984 F.2d 351, 354 - (Fed.Cir. 1992); *George Hyman Const. Co.* v. *United States*, 832 F.2d 574,579 - (Fed.Cir. 1987). "Contract language should be interpreted in its ordinary and commonly accepted meaning, without twisted or strained out of context analysis or regard to subjective unexpressed intent of one of the parties." *Itt Arctic Services, Inc.* v. *United States*, 524 F.2d 680, 207 Ct.Cl. 743 (Ct.Cl. 1975).

A Writ of Certiorari should be issued to the United States Court of Appeals for the Federal Circuit.

For the reasons stated *supra*, the court should answer the questions: #1, No, the appeals court does not have jurisdiction; #2, No, the court of appeals cannot give effect to intentions of the parties other than those stated in the contract language, absent any of the stated conditions; and #3 No, the court of appeals cannot make a contract materially different by import words or interpolate into a contract without stipulating

evidence. If necessary, the petitioner would appreciate the opportunity to brief and argue this case before the Court.

Respectfully submitted,



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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

JACK HILTON HOCKER, Appellant,	)	DOCKET NUMBER SF07529110971-I-1
v.	)	DATE: December 19, 1991
DEPARTMENT OF TRANSPORTATION, Agency.	)	

Raymond W. Laing, Esquire, Law Offices of David S. Handsher, San Francisco, California, for the appellant.

Carmen M. Zervigon, Esquire, Los Angeles, California, for the agency.

BEFORE

Anthony L. Ellison
Administrative Judge

INITIAL DECISION

The appellant timely appealed the action taken by the agency removing him from the position of Aviation Safety Inspector (Accident Prevention Specialist), GS-1825-13, effective April 5, 1991. The Board has jurisdiction over the appeal under 5 U.S.C.

§§ 7513(d) and 7701(a). For the reasons stated below, the agency's action is REVERSED.

BACKGROUND AND FINDINGS

The Accident Prevention Program

The agency's Federal Aviation Administration (FAA) operates a National General Aviation Accident Prevention Program, the purpose of which is to enhance safety in the general aviation community and to promote full compliance with the Federal Aviation Regulations through aviation education. Such educational efforts include pilot seminars, newsletters and one-on-one counseling. Until approximately one year ago, the program was managed by "Accident Prevention Specialists" (APS), which was the title of one of four details comprising the Aviation Safety Inspector position. The other details were: 1) Principal Operations Inspector, 2) Geographic Unit and 3) General Aviation Inspector.

The appellant was the Accident Prevention Specialist for the San Jose Flight Standards District Office (FSDO) from 1988 until his removal in April of 1991. In 1990, pursuant to an extensive System Safety and Efficiency Review, under the aegis of the agency's Project Safe initiative, the agency determined that the position of Accident Prevention Specialist (APS) was to be abolished and replaced by that of Accident Prevention Program Manager (APPM). The focus of the change was to give greater visibility and effectiveness to the Accident Prevention Program, and to assign new responsibilities to the APS, requiring the establishment of new position descriptions. Agency Exhibit 12. One of the principal concerns addressed by the creation of the new APPM position was the perceived loss of the APSs' credibility in the aviation community, because many of them had not been receiving up-to-date flight training, although they are considered to be the agency's aviation industry "experts." In the report produced after the Safety and Efficiency Review, it was noted that, "[o]ccasionally," such training was not received "because the

APS does not hold a medical certificate." Agency Exhibit 12, page III-9. Thus, a primary goal of the creation of the APPM position was to assure that those who ran the Accident Prevention Program would be medically qualified and would maintain flight proficiency. *See* testimony of Lawrence Driscoll, Manager of the Project Safe. Thus, the qualifications standards of the new APPM position explicitly required that incumbents, "other than [those in] the General Aviation Operations Specialty, must meet the following additional standards," including a valid Class II medical certificate. *See* Memorandum of October 1, 1990, Agency Exhibit 8C, page 24. Mr. Driscoll, who authored that memorandum, testified that the requirement for such a certificate had not "spelled out" before for the APS position.

In order to effect the conversion of APSs to APPMs, the agency promulgated certain procedures. *See* Memorandum to All Regional Directors, dated October 1, 1990, from the Acting Directors of the Flight Standards Service, AFS-1, and the Office of Personnel, Agency Exhibit 8C. Those procedures read as follows:

> Each instance where a current Accident Prevention Specialist (APS) does not meet the criteria established in these standards, i.e., possession of a valid Class II medical or the new requirements for current licenses and certificates, must be documented and sent to AFS-6. [1]
>
> If the regional division manager proposes to retain the APS in the new position, the rationale for retention

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[1] AFS-6 is Mr. Driscoll and his Project Safe staff.. Testimony of Mr. Driscoll.

must be forwarded to AFS-1 [2] for approval prior to taking the conversion action. Requests for waivers from the standards must be received in AFS-1 within 45 days from the date of this letter.

If conversion is not recommended, the documentation on the rationale for not converting the current APS must indicate what personnel action is planned for the APS and when the action will be completed. Documentation must be received within 45 days from the date of this letter. No final personnel action may be taken until AFS-1 approval is received [emphasis supplied].

Both Mr. Driscoll and the appellant's supervisor, Ellsworth Ritter, testified that none of these procedures was followed in the appellant's case, even though the appellant was not converted to the APPM position, and in fact was removed from the APS position, for lack of a Class II medical certificate.

The appellant's situation

The appellant suffers from a congenital heart defect called Wolff-Parkinson-White syndrome, one symptom of which is tachycardia or arrhythmia, which is an excessively rapid heartbeat. Such abnormal rhythms can potentially cause drops in blood pressure, light-headedness, fatigue and, possibly, unconsciousness. *See* testimony of Dr. Harry Weigel, the agency's Assistant Regional Flight Surgeon.

Since 1984, the appellant, on an annual or semi-annual basis, routinely applied for an Airman's Medical Certificate and each time received a Special Issuance, pursuant to which the appellant was required to undergo specific cardiovascular tests and examinations. Dr. Weigel testified that Special Issuances are

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[2] AFS-1 is the Director of the Flight Standards Service at the agency's Washington, DC headquarters.

granted when the applicant's particular medical condition is deemed safe, and that they are usually used in situations involving heart conditions. The appellant testified that, in order to keep as many employment options open for himself as possible, he applied for the higher, Class I, medical certificates, but that his heart condition always caused the agency concern when he held his prior job as an Aviation Safety Inspector - Operations, Series GS-1825, in Oakland. His applications resulted in Special Issuances of Class II medical certificates.

In 1987, because of his continuing problems in obtaining proper medical certification, the appellant was assigned to the APS job in San Jose. In June of that year, Timothy P. Forte, then Manager of the Western-Pacific Regional Flight Standards Division, recommended the appellant's reassignment from his Operations Inspector position in Oakland, terming it "necessary due to his lack of medical certification for" that position. In that letter, Mr. Forte specifically recommended that the appellant be reassigned to "some other type position, i.e., Accident Prevention Specialist (APS), where he can perform his duties without a continuous medical certification." Appellant's Exhibit W. Mr. Forte's successor, Richard Merriman, explained at the hearing that the APS job was a "specialty assignment" under the GS-1825 Series, and it is clear from the record that the APS assignment had its own separate position description. Appellant's Exhibit J.

Several months after the appellant was transferred to the APS position in San Jose, his Special Issuance Class II certificate lapsed, and he applied for a Class I certificate. Agency Exhibit 26. That certificate was denied, but he was given instructions for obtaining a Class III Special Issuance. Agency Exhibit 24. The appellant once again applied for a Class I certificate in June of 1989. Federal Air Surgeon Robert McMeekin, M.D., denied that application but awarded the appellant a Special Issuance Class II certificate on October 23, 1989. *See* letter, dated October 23, 1989, from Dr. McMeekin to the appellant, submitted by the agency in its amended response to the appellant's discovery

request. Appeal File Volume I, Tab 6. Thus, at least from June of 1988 to October of 1989, it is undisputed that the appellant did not hold a valid medical certificate of Class II or higher. *See* also Appellant's Exhibit C. During his 2-3 year tenure in the APS position, however, it is also undisputed that he fully performed his duties and his two performance appraisals during that time were "Fully Satisfactory" and "Exceptional." Appellant's Exhibit U.
In 1990, after a tachycardiac episode, the appellant's private physician began treating his condition with a medication called flecainide, which afforded him relief from his symptoms. However, because the U.S. Food and Drug Administration required that drug's manufacturers to publish a warning regarding the possible side effects -- principally vertigo -- the agency's medical personnel determined that use of flecainide would, per se, be a disqualification for an Airman's Medical Certificate. The appellant therefore underwent hospitalization and further testing to determine his tolerance to an alternative drug for his condition. Because of the severe side effects he suffered from the alternative drug, the appellant was forced to resume taking flecainide.

In June of 1990, Dr. Weigel examined the appellant and, on September 6, the Federal Air Surgeon, Dr. McMeekin, informed the appellant that, because of his use of "an unacceptable drug (flecainide)," he was ineligible to receive a medical certificate or a Special Issuance. Appellant's Exhibit K. The appellant testified that he gave a copy of that letter to his supervisor, Mr. Ritter, within a day or two, and that they subsequently had several discussions regarding his medical condition and his future. Mr. Ritter testified that, on October 29, 1990, he informed the appellant that he had decided to transfer to the Geographic Unit, another of the four positions under the Aviation Safety Inspector series, explaining only that it was "for the good of the agency." Testimony of Mr. Ritter and the appellant.

I found Mr. Ritter's testimony to be equivocal and inconsistent in several respects. He testified that he had never considered converting the appellant from the APS to the APPM slot because he lacked a valid second class certificate. However, Mr. Ritter

also adamantly asserted that he was "alarmed" when he first learned that the appellant did not have a valid Class II certificate when the appellant informed him of that fact during their conversation of November 7, 1990, one week after he had revealed his intention to transfer the appellant to the Geographic Unit. He also said that he was "disappointed" that the appellant had not told him sooner.

He also testified that he never considered requesting on the appellant's behalf, a waiver of the medical requirements for the APPM position because he was going to transfer the appellant to the Geographic Unit. However, he acknowledged that the Geographic Unit slot also required a Class II certificate and that he did nothing to pursue such a waiver on the appellant's behalf for that position either.

Mr. Ritter confirmed that he had rated the appellant's performance as an APS "Fully Successful" and "Exceptional" in the two appraisals he gave him, stated that the appellant "met his expectations" in the APS job, and acknowledged that he never counseled him that his performance in that position was unacceptable or marginally successful. Testimony of Mr. Ritter. He explained simply that he felt the Geographic Unit job would be a "better use of [the appellant's] skills," though, as noted above, he did not attempt to secure a waiver of that position's medical requirements to enable the appellant to encumber it. However, Mr. Merriman, having discussed the appellant's situation with Mr. Ritter, testified that he understood, sometime before October 1, 1990, that Mr. Ritter was considering transferring the appellant to another position because he was unhappy with the appellant's performance as the APS, that Mr. Ritter had someone else he wanted to place in the APS position, and that, therefore, the appellant was not eligible for conversion to the APPM position in any case.

In fact, Mr. Ritter did not effect the appellant's transfer to the Geographic Unit, or any other, position. Nor, as noted above, did he, or anyone else at FSDO, comply with the agency's mandatory

procedures governing regional decisions not to convert incumbents of the APS position to that of APPM, which required any such decision to be approved by the head of the Flight Standards Service.

Rather, Mr. Ritter afforded the appellant 60 days from November 7, 1990, in which to obtain "at least a Class II" current airman's medical certificate, despite the fact that he knew that the appellant's necessary use of flecainide automatically disqualified him from such a certificate. He reiterated that instruction in a letter of November 28, 1990, in which he stated that,

> [i]f you do not possess a current and valid medical certificate by January 7, 1991, you will be subject to transfer to a position within the FAA not requiring a valid airmen's medical certificate. In the event a position which does not require a medical certificate is not available, you will be removed from Federal service.

Agency Exhibit 4F.

On December 6, 1990, the appellant requested of the Flight Standards Division Manager, through Mr. Ritter, a waiver of the Class II certificate requirement for the APPM position, citing the agency's procedures for the conversion of APSs to APPMs. Agency Exhibit 8C. The following day, Mr. Ritter informed the appellant that he would be the appropriate official to request such a waiver on the appellant's behalf, but that he did not intend to do so. Appellant's Exhibit C.

The appellant did not obtain a valid Class II certificate by January 7, 1991, and, on March 6, 1991, Mr. Ritter proposed the appellant's removal based on failure to meet the medical requirements of his position and insubordination for refusing to apply for the certificate that had been denied him in September of 1990, based upon Mr. Ritter's oral instruction of November 7, 1990, and his letter of November 28, 1990.

ANALYSIS AND CONCLUSIONS

Over the course of several prehearing conferences in this appeal, the parties agreed that the issues in this case are: 1) What position did the appellant encumber at the time of his removal; 2) did that position require him to hold a valid Class II medical certificate as a condition of employment therein; 3) if so, was the agency required to waive that requirement under 5 C.F.R. § 339.204; and 4) was the appellant's removal the result of impermissible handicap discrimination.

The appellant's position and its requirements

The evidence establishes that the appellant held the position of Accident Prevention Specialist at the time of his removal. As noted above, the APS position was one of four subcategories within the Aviation Safety Inspector, GS-1825, series, but was a "specialty assignment" that had its own position description. Further, it is undisputed that the appellant was never transferred to any other position, and was not converted to the new APPM slot, before he was removed.

I also find that the agency has not proven by preponderant evidence its assertion that APS incumbents were required at all times, as a condition of employment, to hold a valid Class II medical certificate. Mr. Ritter and Mr. Merriman acknowledged that such a requirement was not clearly set forth in any document. Further, Mr. Driscoll explained that one of the primary reasons for the creation of the APPM slot was to assure that those who administered the Accident Prevention Program were fully medically qualified, since many who held the previous APS positions were not. This conclusion is bolstered by the fact that the Division Director of the Western-Pacific Region recommended the appellant's reassignment to the APS position specifically because he could perform its duties "without continuous medical certification."

Further, a memorandum from the Manager of the agency's General Aviation and Commercial Division, dated June 11, 1984, entitled, "Selection of Accident Prevention Specialists," posed the question, "[i]s it necessary for an [APS] to hold a current airman medical certificate?," to which it stated that

> Every region has at one time or another assigned aviation safety inspectors to [APS] positions when they no longer meet the airman medical certificate requirement ... There is no prohibition that would restrict an APS without a medical certificate from flying with a certificated pilot for the purpose of evaluation his or her operational technique provided the subject pilot accepts pilot-in-command responsibility. Appellant's Exhibit H.

While the agency asserted that the appellant "was aware" of the requirement for a Class II certificate at all times, his testimony specifically rebutted that assertion. Further, two other APSs, from different regional offices, Glenn Jay Nelson and Verdon Kleimenhagen, testified that they performed in the APS position for many years without any medical certificate at all, that they were never told to obtain a certificate, and that they were unaware of any such requirement. Mr. Merriman testified that there was "no formal requirement" of a Class II certificate for the APS position, but that
"it was assumed." Finally, the lack of clarity that has characterized this issue within the agency itself for years was perpetuated in this appeal; the agency consistently asserted that the APS position required a Class II certificate,[3] until its Post-

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[3] See Statements of Facts, dated August 7, 1991, Appeal File, Volume II, Tab 9, and October 17, 1991, Volume I of refiled petition, Tab 7.

Hearing Brief of December 6, 1991, in which it stated that "[a]t all times a minimum Third Class airman medical certificate was required of the APS detail.[4]

I find that incumbents of the APS job were not required to hold a valid Class II medical certificate, nor indeed any medical certificate, as a condition of their employment in that position. Therefore, I find that the agency has not established, by preponderant evidence, that it properly removed the appellant from the APS position for failure to hold a required Class II

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[4] In the notice of proposed removal, the agency states in the first charge that the Federal Air Surgeon had determined that the appellant did not "meet the medical standards of Sections 67.13, .15 and .17(f)(2) of the Federal Aviation Regulations and found you ineligible for the issuance of a medical certificate ... You are required to have a medical certificate as a condition of employment." Agency Exhibit 4D. I note that the cited regulatory sections set forth the criteria for issuance of a First-, Second- and Third-Class medical certificate, respectively, and that the charge, as written, does not specify which class certificate the appellant was required to hold. Agency Exhibit 7. However, the second charge, regarding alleged insubordination, was based on Mr. Ritter's instruction to the appellant, supposedly ordering him to obtain "at least a Class II" certificate, on pain of transfer or removal from Federal service. Agency Exhibit 4F. Further, the agency submitted into evidence the regulatory sections delineating the First- and Second-Class certificate criteria, but not that describing those for a Third-Class certificate. Agency Exhibits 7 and 9. Finally, as noted, the agency has consistently maintained, until the Post-Hearing Brief, that the appellant was required to maintain at least a Class II certificate to maintain employment as an Accident Prevention Specialist.

medical certificate. That charge is not sustained.[5]

The applicability of 5 C.F.R. § 339.204

Part 339 of Title 5 of the Code of Federal Regulations governs "Medical Qualification Determinations," and applies, among others, to "all...employees in competitive service positions." I therefore find that this Part applies to the appellant and the agency in this case. Sections 339.202 and .203 authorize agencies to establish medical qualifications or physical requirements that are "[d]irectly related to" and "clearly supported by" the actual duties and requirements of the position. Section 339.204 provides that:

> [a]gencies must waive a medical standard or physical requirement established under this part when there is sufficient evidence that an...employee, with or without reasonable accommodation, can perform the essential duties of the position without endangering the health and safety of the individual or others.

Further, Section 339.102(b) mandates that:

> [p]ersonnel decisions based wholly or in part on the review of medical documentation and the results of medical examinations and evaluations shall be made in accordance with appropriate parts of this title and corresponding Federal Personnel Manual instructions.

Finally, as noted by the appellant, FPM, Chapter 339, Subchapter 4, Section 4-1, paragraph a, states that, in using medical information in making employment decisions, a "medical

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[5] During a prehearing conference in this appeal, the agency dropped the insubordination charge. Therefore, that charge is not considered here.

examination cannot determine an individual's ability to perform the essential duties of a particular positions." Here, the agency determined that the appellant could not perform the essential duties of the APS position based solely on his medical examination and the fact that he had to take flecainide. In removing him, it did not assert, and it has not demonstrated, that his condition and medication were reasonably related to the actual requirements and duties of the APS position, as required by 5 C.F.R. § 339.202, or that the medical requirement that he was alleged to have lacked, was clearly supported by those actual requirements and duties. Further, as noted, the appellant and others were able to perform the essential duties of that job without medical certification and without any form of accommodation. Thus, I find that, under 5 C.F.R. § 339.204, the agency would have been required to waive a medical requirement for a Class II medical certificate in the APS position in this case, had such a requirement formally existed.[6]

The affirmative defense of handicap discrimination

In *Savage v. Department of the Navy*, 36 M.S.P.R. 148, 151-52 (1988), the Board held that the necessary elements of a prima facie case of handicap discrimination generally include a showing that the appellant is a "handicapped person" and that the action appealed to the Board was based on the handicap, and, to the extent possible, articulation of a "reasonable accommodation" under which the appellant believed that he could perform the necessary duties of his position, or a vacant position to which he could be reassigned.

Here, the parties stipulated during a prehearing conference that the appellant is a "handicapped person." A "handicapped person" is defined, in 29 C.F.R. § 1613.702, as one who has an

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[6] See my discussion of waiver as a potential reasonable accommodation, *infra*.

impairment that substantially limits one or more major life activity, including work, or "is regarded as having such an impairment." The appellant testified that his Wolff-Parkinson-White syndrome -- and the related requirement that he take flecainide to control the symptoms of that condition -- did not substantially limit any of his major life activities. However, because the agency considered the use of flecainide to disqualify the appellant, per se, from obtaining a medical certificate, and considered such a certificate to be a condition of his employment, it is clear that the appellant's cardiovascular ailment was "treated by [the] employer as constituting" a substantial limitation of major life activities, and that his taking of flecainide substantially limits his ability to work "only as a result of the attitude of [the] employer toward such impairment." 29 C.F.R. § 1613.702(e). Accordingly, I find that the appellant is a handicapped person within the applicable definition, and that he has established a prima facie case of handicap discrimination.

Also, by letter dated December 6, 1990, the appellant articulated the possibility of accommodating his handicapping condition by placing him in the new APPM position and waiving the requirement of a medical certificate set forth for that job. Appellant's Exhibit C. As noted above, Mr. Ritter rejected that request the next day and never considered pursuing such a waiver. On February 12, 1991, Personnel Management Specialist Barbara Perez informed the appellant by letter that, because he had been denied a medical certificate, his only alternatives were to apply for disability retirement benefits, or to request assistance in locating another position within the agency. Agency Exhibit 4E. With regard to the latter alternative, she requested that the appellant provide, within 15 days, a current Standard Form 171, and a "memorandum stating your geographic mobility, lowest grade acceptable, areas of job interest, and any other factors which could affect your placement in another position."

Upon advice of his previous attorney-representative, the appellant did not provide Ms. Perez with the requested information regarding relocation. However, by letter of March 21,

1991, that representative specifically asked Mr. Ritter to "take whatever steps are reasonably necessary to accommodate [*sic*] [the appellant's] known medical condition by placing him in his former position or by waiving the requirement for medical certification and placing him in the Program Manager [APPM] position." He also stated that he felt there were "many other accommodations [*sic*] to his medical condition that could be reasonably made by the agency and my suggestions herein are not intended to be exclusive of any that you might have." Agency Exhibit 29.

Five days later, after having "given full consideration" to that letter, Mr. Ritter issued his letter of decision to remove the appellant effective April 5, 1991. Agency Exhibit 4C. In fact, Mr. Ritter testified that he never considered the appellant to be a handicapped person, and that he never considered or discussed with others the possibility of accommodating the appellant's condition. Kerry Klegman, a Labor Relations Branch employee who assisted Mr. Ritter in taking the removal action, testified that he raised the issue of whether or not the agency had a duty to accommodate the appellant's medical condition with his boss, Malachy Coghlan, and with Mr. Ritter, referring them to the FAA Handbook that provides internal guidelines for the "Utilization of Employees Becoming Handicapped and Otherwise Medically Non-Qualified." Agency Exhibit 4L. Those guidelines set forth the agency's policy "to assure, to the extent possible, continued employment of employees who...are found to be medically non-qualified for their present position," including the use of "the agency's training resource to prepare the employee for suitable positions in other occupations...." The agency's stated policy also provides that "[f]ull use shall be made of the agency's authority to grant waivers to the physical requirement, when possible, to permit retention of the employee in his/her occupation."

However, Mr. Coghlan and Mr. Klegman informed Mr. Ritter that, because the appellant was being terminated, in part, for insubordination, his removal was an "adverse action" and "we were not obligated to accommodate any handicap." Testimony of

Mr. Klegman. Further, Mr. Ritter testified in a deposition before the hearing that he did not refer to these policies or guidelines in proposing and deciding to remove the appellant. Appellant's Exhibit R. pp. 68-70.

The agency has made no showing that the APS job, or the APPM job in which the appellant expressed a desire to be accommodated, could not be minimally reconfigured to permit an employee with the appellant's condition and medication to perform its duties without a medical certificate. The agency asserts that it is only those duties requiring an employee actually to operate an aircraft that form the basis for the medical certificate requirement. Testimony of Mr. Ritter. In fact, the appellant's undisputed testimony was that he acted as pilot-in-command of an aircraft only once during his tenure as an APS, and that time was not required to do so as a duty of his position.

Further, as noted previously, the agency itself had stated that there was no prohibition restricting an APS without a medical certificate from flying with a certificated pilot for the purpose of evaluating his or her operational technique provided the subject accepts pilot-in-command responsibility. Appellant's Exhibit H. The agency has made no showing that there is, or should be, such a prohibition applicable to APPM incumbents when performing those same evaluation duties.

Nor has the agency shown that the appellant otherwise could not perform in the APPM position with a waiver of medical certification requirements. In its Post-Hearing Brief, the agency states that there was no formal provision for waiver of the requirement for a medical certificate in the APS position, and that only the new APPM position provides for the possibility of a

waiver.[7] It also states that the conditions for granting such a waiver are "quite specific." However, Mr. Merriman acknowledged that, while he understood that such waivers for the APPM position were meant to be temporary only, this was not set forth specifically in the
memorandum implementing the position description, job task listings, performance standards, KSAO statements or qualification standards pertaining to that position. Testimony of Mr. Merriman. *See also* Agency Exhibit 8C. Further, Mr. Driscoll, who authored that memorandum, testified that the duration of the condition underlying a potential waiver is one of several factors to be considered by the agency in assessing a waiver request, including the nature of the condition, the impact on the office, what arrangements would have to be made to perform the particular tasks an employee with a waiver may not be able to do, and what action the agency would have to take if it denied the waiver request. Testimony of Mr. Driscoll.

The agency has not demonstrated -- and, in fact, acknowledged that it has not determined -- what effect, if any, the lack of a medical certificate would have on an employee's ability to function in the APPM position. Mr. Driscoll explained that a waiver was granted to Mr. Kleimenhagen (a previous APS who was converted to the APPM slot) on January 10, 1991, for a period of one year, during which "the impact of using an APPM without a medical certificate" was to be evaluated, "including the effect on Mr. Kleimenhagen's performance." Agency Exhibit 21. *See also* testimony of Mr. Kleimenhagen. The letter granting that waiver states that an extension of the waiver may be requested after the first year, and explains that the agency is

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[7] Having never formally articulated the requirement for a medical certificate in the APS position, the agency would have no need for a formal provision for waiving it. Further, as I have previously described; to the extent such a requirement was assumed by some to exist, it was frequently honored in the breach.

particularly concerned with how the full range of job functions will be accomplished by the district office, including the certification tasks assigned. Based on the modification to the position description which is necessary, you will also need to modify the standardized performance standards.

Agency Exhibit 21.

Clearly, then, the agency was, and is, willing and able to explore the feasibility of allowing a former APS to perform as an APPM with a waiver of that position's medical requirements -- with
no absolute limit on its duration -- and even of modifying the position's performance standards, if necessary, to facilitate such a waiver.[8] It has shown no valid management reason why it did not, or could not, do so in the appellant's case, or that this proposed accommodation would impose an undue hardship on its operations.

Based on the foregoing, I find that, apart from an "automatic job search," of the kind normally conducted for an employee in any proposed removal case,[9] the agency made no effort whatsoever to accommodate the appellant's condition to enable him to retain his employment, despite its own policy to do so, and

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[8] Mr. Kleimenhagen has performed as an APPM without a medical certificate since his conversion in November of 1990; another converted APS, Glenn Nelson, has also performed in the APPM slot without certification since his conversion in November of 1990, and, while he was instructed in August of 1991 to take a physical examination in order to obtain a Class II certificate, he has yet to receive such a certificate and continues to perform his APPM duties. Testimony of Mr. Kleimenhagen and Mr. Nelson.

[9] Testimony of Mr. Klegman.

the appellant's articulated suggestions. Accordingly, I find that the agency has failed to rebut the appellant's prima facie case, and that his removal was the result of prohibited discrimination on the basis of his perceived handicapping condition.

CONCLUSION

In sum, I find that the agency: 1) Improperly removed the appellant from the APS for failure to hold a medical certificate that was not officially, or in fact, required; 2) failed to follow its own mandatory procedures for justifying, and obtaining approval for, its failure to convert the appellant from the APS to APPM position; and 3) failed its obligation to make a meaningful attempt to accommodate the appellant's condition, and the medication needed to treat it, underlying its stated reason for his removal.

DECISION

The agency's action is REVERSED.

ORDER

The agency is ORDERED to cancel the removal and to retroactively restore appellant effective April 5, 1991. This action must be accomplished no later than 20 calendar days after the date this initial decision becomes final.

Upon reinstatement, the agency is ORDERED to make a thorough and bona fide effort to accommodate the appellant's condition and medication. At a minimum, this effort must include an extensive written assessment of the feasibility of placing the appellant in an APPM position with a waiver of the certification requirement, in accordance with the upcoming evaluation of such waivers due to be furnished to Mr. Driscoll and others at the end of the first year of Mr. Kleimenhagen's waiver in January of

1992.[10] Agency Exhibit 21. However, the agency's consideration of granting the appellant a waiver of the certification requirement for the APPM position must not exclude its thorough assessment of the feasibility of providing the appellant assistance in performing those specific tasks that actually require him to operate aircraft as pilot-in-charge, the possible elimination of such duties, or other forms of job restructuring, or any other forms of reasonable accommodation.

The agency is also ORDERED to issue a check to appellant for the appropriate amount of back pay, with interest, and benefits as required by Postal Service regulations, no later than 60 calendar days after the date this initial decision becomes final. Appellant is ORDERED to cooperate in good faith with the agency's efforts to compute the amount of back pay and benefits due and to provide all necessary information requested by the agency in furtherance of compliance.

If there is a dispute about the amount of back pay due, the agency is ORDERED to issue a check to appellant for the undisputed amount no later than 60 calendar days after the date this initial decision becomes final. Appellant may then file a petition for enforcement with this office concerning the disputed amount.

The agency is further ORDERED to inform appellant in writing of all actions taken to comply with the Board's Order and the date on which it believes it has fully complied. If not notified, appellant should ask the agency about its intentions.

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[10] Inasmuch as the agency has argued that the appellant could not perform the essential duties of the APPM position because he lacked a Class II medical certificate, such a determination can only be based on an assessment of the direct relationship between that medical requirement and the appellant's ability to perform the actual work-related duties of the job. See discussion of the requirement, set forth in 5 C.F.R. § 339.204, that an agency waive a medical qualification under certain circumstances, *supra*.

INTERIM RELIEF

If a petition for review is filed, I **ORDER** the agency to provide interim relief to appellant in accordance with Section 6 of the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 5 U.S.C. § 7701(b)(2)(A). The relief shall be effective upon the issuance of this decision and will remain in effect until the decision of the Board becomes final.

FOR THE BOARD:

s/ A. L. Ellison
Anthony L. Ellison
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on January 23, 1991, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by
filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Equal Employment Opportunity Commission
Office of Review and Appeals
P. O. Box 19848
Washington, DC 20036

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTIONS BOARD
SAN FRANCISCO REGIONAL OFFICE

JACK HILTON HOCKER, Appellant,	)	Docket No. SF07529110604
v.	)	Date: July 7, 1992
DEPARTMENT OF TRANSPORTATION, Agency.	)	

APPELLANTS MOTION FOR ENFORCEMENT OF BOARDS ORDER

Comes now Appellant, by and through counsel, to petition the Merit Systems Protection Board to order the agency to reasonably accommodate Appellant's physical handicap by placing him in the position of Accident Prevention Program Manager, San Jose FSDO, consistent with the final decision issued in this matter.

BACKGROUND

Appellant timely appealed the action taken by the agency in removing him from his position of Aviation Safety Inspector (Accident Prevention Specialist), GS-1825-13, effective April 5, 1991. A hearing was held before an Administrative Judge of the Merit Systems Protection Board on November 18 and 19, 1991 in the Board's San Francisco Regional Office. The Administrative Judge issued his initial decision reversing the agency's action on

December 19, 1991. The Administrative Judge found, inter alia, that Appellant's removal was the result of prohibited discrimination on the basis of perceived handicapping condition. Initial Decision at 17. Neither side filed an appeal of the Initial Decision to the Merit Systems Protection Board and that decision became final on January 23, 1991.

The Initial Decision provided as follows:

> The agency is **ORDERED** to make a thorough and bona fide effort to accommodate the appellant's condition and medication. At a minimum, this effort must include an extensive written assessment of the feasibility of placing Appellant in an APPM position with a waiver of the certification requirement, in accordance with the upcoming evaluation of such waivers due to be furnished to Mr. Driscoll and others at the end of the first year of Mr. Kleiminhagen's waiver in January of 1992. Agency Exhibit 21. However, the agency's consideration of granting the appellant a waiver of the certification requirement for the APPM position must not exclude its thorough assessment of the feasibility of providing the appellant assistance in performing those specific tasks that actually require him to operate aircraft as pilot-in-charge, the possible elimination of such duties, or other forms of job restructuring or any other forms of reasonable accommodation.

Initial decision at 18-19.

Appellant was restored to duty on March 12, 1992 to the position of Accident Prevention Specialist, the position he occupied at the time of his discriminatory and illegal removal. Nevertheless, Appellant did not resume those duties and was instead detailed to an assignment that does not require a medical certificate. *Letter dated March 12, 1992, attached hereto as Exhibit 1.* Actually, the "assignment" to which Appellant was detailed consisted of an

unclassified position for which there no job description existed. *SF-50 dated April 8, 1992, attached hereto as Exhibit 2.* The duties required of Appellant in that position consist primarily of performing work of a clerical nature.

When originally placed in this position, Appellant was notified that his detail would last until such time that a "feasibility determination is completed as to whether you will be able to work as an Accident Prevention Program Manager." *Letter dated March 6, 1992, attached hereto as Exhibit 3.*

On June 15, 1992 the undersigned wrote to the agency requesting to be advised of when the agency anticipated complying with the Board's order by completing its feasibility assessment. The agency responded on June 25, stating that the feasibility study was "not yet completed", but claiming rather disingenuously that the agency stood "in full compliance with the Board's order." *Letter dated June 25, 1992, attached hereto as Exhibit 4.*[1] On July 7, the undersigned received a copy of the agency's "Feasibility Assessment", dated June 19, 1992, a copy of which is attached hereto as Exhibit 5.

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[1] Curiously, the "Feasibility Assessment" bears, on page 3, a signature and a date of June 19, 1992, nearly a week before it was judged "not yet complete "

ARGUMENT

1. The Agency Has Not Complied With The Board's Final Decision In This Appeal. The Agency Has Not Provided An Extensive Written Assessment Of The Feasibility Of Placing Appellant In An APPM Position With A Waiver Of The Certification Requirement. Furthermore, The Agency Did Not Assess The Feasibility Of Providing The Appellant Assistance In Performing Those Specific Tasks That Actually Require Him To Operate Aircraft As Pilot-In-Charge, The Possible Elimination Of Such Duties, Or Other Forms Of Job Restructuring Or Any Other Forms Of Reasonable Accommodation

As set forth *supra*, the Board's order in this case was clear and concise. The agency's so-called "Feasibility Assessment" is nothing more than old wine in new bottles, a feckless attempt to mislead the Board into finding that the agency is in compliance with its order. The Board should not be deceived.

During the hearing in this appeal, the agency made clear that another employee, similarly situated to Appellant, had a waiver of the medical requirements for the APPM position Verdon Kleiminhagen's waiver [2] was to be evaluated shortly after January 1992, particularly in terms of how the full range of job functions

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[2] Mr. Kleiminhagen is presently serving as the Accident Program Prevention Manager in the Minneapolis FSDO At the hearing he testified that he did not possess a valid Class II Airman's Medical Certificate and that he was medically incapable of qualifying for one under current FAA regulations Testimony of Mr. Kleiminhagen To date, Mr. Kleiminhagen continues to perform the duties of the APPM without possessing a medical certificate

would be accomplished, including the certification tasks assigned. Agency Exhibit 21. There is absolutely no evidence of which shows this evaluation of Mr. Kleiminhagen was ever performed by the agency.

The meager two and a quarter page "Feasibility Assessment" submitted by the agency in this case can scarcely be said to constitute "an extensive assessment of the feasibility of placing Appellant in an APPM position with a waiver of the certification requirement." It makes absolutely no reference to Mr. Kleiminhagen's situation or any evaluation that was conducted of it, nor does it articulate any facts pertinent to the San Jose FSDO which show that a waiver of the medical requirement in Appellant's case is not feasible. It is nothing but the same cant voiced by the agency throughout the pendency of this appeal.

Furthermore, aside from a rote recital of the position description for the APPM position, there is no mention in the agency's so-called "Assessment" of the feasibility of providing

Appellant assistance in performing those specific tasks that actually require him to operate aircraft as pilot-in-charge, the possible elimination of such duties, or other forms of job restructuring or any other forms of reasonable accommodation. There is no attempt to address any of the proposed accommodations Appellant articulated, at the order of the Administrative Judge in October of 1991.[3]

The first paragraph of the so-called "Feasibility Assessment" discusses the reasons for the change from the APS position to the APPM position. It is nothing but a mere re-hash of the agency's

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[3] During the Parties pre-hearing conference held on October 22, 1991, the Administrative Judge order Appellant to submit a list of proposed reasonable accommodations to the agency. A letter outlining such accommodations was sent to the agency that day. *Letter dated October 22, 1993, attached hereto as Exhibit 6.*

insufficient evidence at the hearing:

> The focus of the change was to give greater visibility and effectiveness to the Accident Prevention Program, and to assign new responsibilities to the APS, requiring the establishment of new position descriptions. Agency Exhibit 12. One of the principal concerns addressed by the creation of the new APPM position was the perceived loss of the APS' credibility in the aviation community, because many of them had not been receiving up-to-date flight training, although they were considered to be the agency's aviation industry "experts".

Initial Decision at 2.

The second paragraph of this "Feasibility Assessment" restates the agency's long standing contention that a medical certificate is required to perform the duties of the APPM position. This point was made at the hearing and noted by the Administrative Judge:

> Thus a primary goal of the creation of the APPM position was to assure that those who ran the Accident Prevention Program would be medically qualified and would maintain flight proficiency. See Testimony of Lawrence Driscoll

Initial Decision at 2.

Again, this second paragraph scarcely constitutes an assessment of the feasibility of placing Appellant in the APPM position with a waiver of the medical requirement. In the same paragraph, the agency argues further that placing Appellant in the APPM position with a waiver would damage the credibility of the program as a whole. Exhibit 5, para. 2. This is mere unfounded speculation and fails to account for the APPM programs

employing both Mr. Kleiminhagen and Glenn Jay Nelson.[4] Both of these individuals were former APS' converted to APPM positions in two different agency regions in November of 1990. Testimony of Kleiminhagen and Nelson. Both of these gentlemen continue to hold APPM positions and neither currently possesses a valid Class II airman's medical certificate. The agency's argument that extending a similar waiver to Appellant would damage the credibility of the APPM program as a whole is obviously makeweight and inconsistent with the known facts. That the agency would continue to make this unfounded assertion in light of the known facts strongly suggests the agency bears substantial ill will towards Appellant. More significantly, the agency's argument begs the question of whether it could waive its requirement for a medical certificate for this position.

Agency witness Lionel Driscoll testified that there are several factors that should be considered in assessing a waiver request:

> [t]he duration of the condition underlying a potential waiver is one of several factors to be considered by the agency in assessing a waiver request, including the nature of the condition, the impact on the office, what arrangements would have to be made to perform the particular tasks an employee with a waiver may not be able to do, and what action agency the would have to take if it denied the waiver. *Testimony of Mr. Driscoll.*

Initial Decision at 16.

If, as the agency contends, this so-called "Feasibility Assessment" constitutes compliance with Board's order, why does it omit factors that Leon Driscoll, the Director of the Project Safe

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[4] Mr. Nelson is employed in an FAA region different from Mr. Kleiminhagen's position.

staff, deemed critical to any inquiry into a waiver of the medical certification requirement for persons occupying the APPM position?

The third paragraph of the agency's "Feasibility Assessment" recounts Appellant's physical ailments and reaches the obvious conclusion that "it would be unreasonable to allow a pilot taking vertigo-inducing medication to pilot an airplane." This conclusion ignores the question posed by the agency regarding the Accident Prevention Specialist position, set forth in Appellant's Exhibit H "[i]s it necessary for an [APS] to hold a current airman medical certificate?" The agency's answer, set forth in Appellant's Exhibit H was succinct:

> [t]here is no prohibition that would restrict an APS without a medical certificate from flying with a certificated pilot for the purpose of evaluation of his or her operational technique provided the subject pilot accepts pilot-in-command responsibility.

Initial Decision at 9.

How could an extensive written assessment, required by the Board's order, avoid addressing this particular question, raised by the agency itself as an obvious accommodation?

The fourth and fifth paragraphs of the agency's "Feasibility Assessment" are yet another reiteration of evidence already in the record. *Testimony of Ritter and Merriman, see Agency Exhibit 8 and 12, pp. III-8 through 11.* As such, they can scarcely be said to constitute the extensive assessment contemplated in the Board's order

Page two of the agency's "Feasibility Assessment" is nothing more than a restatement of the APPM position description and provides scant analysis. It is merely a restatement of testimonial and documentary evidence already in the record. *See Testimony of Ritter and Agency Exhibit 8.*

During the hearing, the agency addressed Appellant's proposed accommodations and proffered reasons as to why they

would not work. *See Testimony of Ritter.* Nevertheless, this purported extensive assessment now submitted by the agency fails to address even a single suggested accommodation proposed by Appellant. Furthermore, the agency continues to shirk its legal burden to identify reasonable accommodations on its own.

In sum, the agency has continued to disregard its clear legal obligation to make a meaningful attempt to accommodate Appellant's condition and the medication needed to treat it. As is obvious from the facts set forth *supra* the agency was completely unwilling to entertain the obligations imposed on it by the Board's order until Appellant's Representative inquired as to the agency's intentions. The repetitive, facile and cursory "analysis" contained in its "Feasibility Assessment" makes obvious that it was not a product nearly seven months in the drafting, but instead was something slapped together only after Appellant reminded the agency of the Board's order. That the agency cooked up a complete re-hash of the record in this case and served it up as the required "extensive written assessment" underscores the fact that this agency is contemptuous of both Appellant and the agency's obligations under the Rehabilitation Act of 1973.

In his Initial Decision, the Administrative Judge noted that the agency was unwilling to explore the feasibility of allowing Appellant to perform as an APPM with a waiver of that position's medical requirements with no limitation on the waiver's duration. *Initial Decision at 17.* Despite the Board's order to do so and despite the passage of more than six months in which to accomplish the requirements of the order, the agency remains unwilling. Moreover, in Appellant's case, the agency still refuses to consider the possibility of modifying the APPM position's performance standards, as it has done for two other individuals, Mr. Kleiminhagen and Mr. Nelson. *Initial Decision at 17.* Furthermore, despite the Board's order to do so, the agency still has shown no valid reason why it cannot make such modifications in Appellant's case nor has it shown, even facially, much less substantively, that Appellant's proposed accommodations would impose an undue hardship on its operations. The agency

continues to make no effort whatsoever to accommodate Appellant's condition to enable him to retain his employment, despite its own policy to do so and Appellant's suggested accommodations. *See Appellant'sHearing Exhibit R.*

The agency's evidence in its "Feasibility Assessment" is virtually identical to the evidence it adduced at hearing. Such evidence was insufficient to overcome Appellant's affirmative defense of handicap discrimination. The Board should not accept the agency's claims that the agency has now established, on the basis of the same evidence, that it cannot accommodate Appellant's perceived handicap. The agency has already had its bite at that particular apple.

CONCLUSION

For the reasons set forth, Appellant respectfully requests the Board to order the agency to place him immediately in the APPM position and to eliminate, as it has for two other agency employees who are identically situated to Appellant, those actual job duties which Appellant is prevented from performing because of his handicapping condition.

Respectfully submitted,

LAW OFFICES OF DAVID S. HANDSHER

BY s/ Raymond W. Laing
RAYMOND W. LAING

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTIONS BOARD
SAN FRANCISCO REGIONAL OFFICE

JACK HILTON HOCKER, Appellant,	)	DOCKET NUMBER SF0752910971-C-1
v.	)	DATE: October 23, 1992
DEPARTMENT OF TRANSPORTATION, Agency.	)	

Raymond W. Laing, Esquire, Law Offices of David S. Handsher, San Francisco, California, for the appellant
Carmen M Zervigon, Esquire, Los Angeles, California, for the agency

BEFORE

Anthony L. Ellison
Administrative Judge

INITIAL DECISION

The appellant petitions for enforcement of an initial decision of December 19, 1991, in which I reversed the agency's removal action. The agency has responded to the enforcement petitions. The Board has jurisdiction over the petitions for enforcement. 5 C.F.R. § 1201 182. The party that is alleged to have failed to comply with an initial decision has the burden of demonstrating

its compliance. 5 C.F.R. § 1201 183 (a)(1). For the following reasons, the petitions for enforcement are DISMISSED.

ANALYSIS AND FINDINGS

In the initial decision, I found that the agency failed its obligation to make a meaningful attempt to accommodate the appellant's handicapping condition, and the medication needed to treat it, underlying its stated reason for his removal. Consequently, I ordered the agency, upon the appellant's reinstatement,

> to make a thorough and bona fide effort to accommodate the appellant's condition and medication. At a minimum, this effort must include an extensive written assessment of the feasibility of placing the appellant in an APPM [Accident Prevention Program Manager] position with a waiver of the certification requirement. However, the agency's consideration of granting the appellant a waiver of the certification requirement for the APPM position must not exclude its thorough assessment of the feasibility of providing the applicant assistance in performing those specific tasks that actually require him to operate aircraft as pilot-in-charge, the possible elimination of such duties, or other forms of job restructuring, or any other forms of reasonable accommodation. (Emphasis added.)

I also noted that, "[i]nasmuch as the agency has argued that the appellant could not perform the essential duties of the APPM position because he lacked a Class II medical certificate, such a determination can only be based on an assessment of the direct relationship between that medical requirement and the appellant's ability to perform the actual related duties of the job," referring to the requirement, set forth in 5 C.F.R. § 339.204, that an agency waive a medical qualification under certain circumstances. (Emphasis added.) *See also* 5 C.F.R. § 339.102 (b).

The appellant alleges that the feasibility assessment produced by the agency on June 19, 1992, insufficiently addressed the factors specified in that order, and that the agency had also failed to make the appellant whole with regard to several matters of pay
and benefits. During telephone conferences of October 22 and 23, the parties agreed that the agency would produce a new feasibility study, within 45 days, in order to address more completely and specifically the concerns quoted above. That assessment will consider, among all other possible forms of accommodation, the possibility of eliminating, shifting, assisting the appellant in the performance of, or otherwise modifying the pilot-in-command responsibilities of the APPM position, in light of the actual proportion of the total duties of that position such responsibilities represent, as documented by data found in time and activity reports from the San Jose District Office, or from a verifiably representative sampling of other district offices nationwide.

The agency also agreed to provide an audit by the payroll office, or other relevant branches of the agency, in an effort to address and resolve the several pay and benefits discrepancies and problems noted by the applicant in his petitions for enforcement. Regarding the particular problem of the appellant's retirement account, the agency will enter the appropriate data in its payroll computer system in order to have the entire amount of his retirement account -- totaling those amounts amassed both before and after his subsequently reversed termination -- reflected on each future earnings and leave statement, as would have been the case if he had never been terminated. In the alternative the agency will provide a letter to the appellant explaining in detail, as it did several times during the telephone conferences, that he did not receive a lump-sum payment of the $45,366 in his retirement account at the time of his termination, that that amount remains in his retirement account and is reflected on the last earnings and leave statement he received before that termination, and that only the additional retirement contributions made since his

reinstatement will be reflected on each prospective earnings and leave statement.

In exchange for the agency's submission of these materials within 45 days of the date of this decision, the appellant agreed to have the instant enforcement petitions dismissed as moot. The Board's enforcement power is continuing in nature, however; thus, the appellant may file another petition for enforcement if he believes that subsequent agency actions evidence non-compliance with the initial decision. *Swafford v. Tennessee Valley Authority*, 26 M.S.P.R. 680, 682 (1985).

DECISION

The appellants petitions for enforcement are DISMISSED.

FOR THE BOARD: s/ A. L. Ellison
Anthony L. Ellison
Administrative Judge

NOTICE TO APPELLANTS

This initial decision will become final on November 27, 1992, unless a petition for review is filed by that date or the Board reopens the came on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk Of the Board "
Merit Systems Protection Board
1120 Vermont Avenue, NW , Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTIONS BOARD
SAN FRANCISCO REGIONAL OFFICE

JACK HILTON HOCKER, Appellant,	)	Docket No. SF07529110604
v.	)	Date: January 7, 1993
DEPARTMENT OF TRANSPORTATION, Agency.	)	

APPELLANTS MOTION FOR ENFORCEMENT OF BOARD'S ORDER

Comes now Appellant, by and through counsel, to petition the Merit Systems Protection Board to order the agency to reasonably accommodate Appellant's physical handicap by placing him in the position of Accident Prevention Program Manager, San Jose FSDO, consistent with the final decision issued in this matter.

BACKGROUND

Appellant timely appealed the action taken by the agency in removing him from his position of Aviation Safety Inspector (Accident Prevention Specialist), GS-1825-13, effective April 5,

1991.. A hearing was held before an Administrative Judge of the Merit Systems Protection Board on November 18 and 19, 1991 in the Board's San Francisco Regional Office. The Administrative Judge issued his initial decision reversing the agency's action on December 19, 1991. The Administrative Judge found, inter alia, that Appellant's removal was the result of prohibited discrimination on the basis of perceived handicapping condition.. *Initial Decision at 17.* Neither side filed an appeal of the Initial Decision to the Merit Systems Protection Board and that decision became final on January 23, 1991.

The Initial Decision provided as follows:

> The agency is **ORDERED** to make a thorough and bona fide effort to accommodate the appellant's condition and medication. At a minimum, this effort must include an extensive written assessment of the feasibility of placing Appellant in an APPM position with a waiver of the certification requirement, in accordance with the upcoming evaluation of such waivers due to be furnished to Mr. Driscoll and others at the end of the first year of Mr. Kleiminhagen's waiver in January of 1992. Agency Exhibit 21. However, the agency's consideration of granting the appellant a waiver of the certification requirement for the APPM position must not exclude its thorough assessment of the feasibility of providing the appellant assistance in performing those specific tasks that actually require him to operate aircraft as pilot-in-charge, the possible elimination of such duties, or other forms of job restructuring or any other forms of reasonable accommodation.

Initial decision at 18-19.

Appellant was restored to duty on March 12, 1992 to the position of Accident Prevention Specialist, the position he occupied at the time of his discriminatory and illegal removal. Nevertheless Appellant did not resume those duties and was

instead detailed to an assignment that does not require a medical certificate. Actually, the "assignment" to which Appellant was detailed consisted of an unclassified position for which there no job
description existed. The duties required of Appellant in that position consist primarily of performing work of a clerical nature. When originally placed in this position, Appellant was notified that his detail would last until such time that a feasibility determination is completed as to whether you will be able to work as an Accident Prevention Program Manager.

On June 15, 1992 the undersigned wrote to the agency requesting to be advised of when the agency anticipated complying with the Board's order by completing its feasibility assessment. The agency responded on June 25, stating that the feasibility study was "not yet completed", but claiming rather disingenuously that the agency stood "in full compliance with the Board's order."

On July 7, the undersigned received a copy of the agency's "Feasibility Assessment", dated June 19, 1992, a copy of which is attached hereto as Exhibit 5. At that time Appellant, by and through counsel, filed a motion for enforcement. Said motion addressed a number of issues relating to enforcement of the Board's original decision.

During a subsequent telephone conference held between the parties and the Administrative Judge on October 22 and 23, 1992, the parties agreed that it would produce a new feasibility study within 45 days to address the concerns articulated by the Administrative Judge in his initial decision, dated December 19, 1991 and comply with other provisions of the Board's original decision.

On December 7, 1992 the agency sent the Administrative Judge and the undersigned (but not Appellant) a document described as Feasibility Assessment II. This feasibility study does not conform to the order of the Board with respect to its coverage, does not conform to generally accepted notions of what constitutes a feasibility study, and is argumentative. Insofar as it

addresses any of the concerns articulated by the Board, it does not establish that accommodating Appellant by placing him in the position of the Accident Program Prevention Manager would create an undue hardship on the agency.

Appellant and counsel are still reviewing the agency's feasibility study and will present additional evidence and argument in support of this motion. Appellant has filed the instant motion in order to avoid prejudice to his right to seek enforcement through a claim that he did not timely seek enforcement.

Respectfully submitted,

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTIONS BOARD
SAN FRANCISCO REGIONAL OFFICE

JACK HILTON HOCKER, Appellant,	)	Docket No. SF07529110604
v.	)	Date: March 16, 1993
DEPARTMENT OF TRANSPORTATION, Agency.	)	

APPELLANT'S REQUEST FOR A HEARING

Comes now Appellant, by and through counsel, to request that the Board hold a hearing on the issue of whether the agency is liable to Appellant for compensatory damages because of its discriminatory conduct towards him, and if so, the amount of such damages.

Respectfully submitted,
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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

JACK HILTON HOCKER, Appellant,	)	DOCKET NUMBER SF07529110971-C-2
v.	)	
DEPARTMENT OF TRANSPORTATION, Agency.	)	DATE: April 16, 1993

Raymond W Laing, Esquire, Law Offices of David Handsher, San Francisco, California, for the appellant

Carmen Zervigon, Esquire, Los Angeles, California, for the agency

BEFORE

Anthony L Ellison
Administrative Judge

RECOMMENDED DECISION

The appellant petitions for enforcement of an initial decision of December 19, 1991, in which I reversed the agency's removal action The agency has responded to the enforcement petition. The Board has jurisdiction over the petition for enforcement 5 C.F.R. § 1201.182. The party that is alleged to have failed to

comply with an initial decision has the burden of demonstrating itscompliance. 5 C.F.R. § 1201 183(a)(1). For the following reasons, the petition for enforcement is GRANTED.

BACKGROUND

In the initial decision, I found that the agency: 1) Improperly removed the appellant from the former Accident Prevention Specialist (APS) position for failure to hold a medical certificate that was not officially, or in fact, required; 2) failed to follow its own mandatory procedures for justifying, and obtaining approval for, its failure to convert the appellant from the old APS job to the new Accident Prevention Program Manager (APPM) position in 1990; and 3) failed its obligation to make a meaningful attempt to accommodate the appellant's inability to obtain the newly required medical certificate, underlying its stated reason for his removal. See Initial Appeal File (IAF), Tab 17.

In the initial decision, I noted that the agency's internal guidelines for the "Utilization of Employees Becoming Handicapped and Otherwise Medically Non-Qualified" set forth the agency's policy "to assure, to the extent possible, continued employment of employees who...are found to be medically non-qualified for their present position." The agency's stated policy also provides that "[f]ull use shall be made of the agency's authority to grant waivers to the physical requirement, when possible, to permit retention of the employee in his/her occupation" *Id.*, page 14.

I also found that the agency had not demonstrated -- and, in fact, acknowledged that it had not determined -- what effect, if any, the lack of a medical certificate would have on an employee's ability to function in the APPM position. At the hearing in late 1991, evidence was adduced that two other former incumbents of the APS position who were properly converted to the APPM job -- Verdon Kleimenhagen and Glenn Jay Nelson -- had performed in the latter position since their conversions in November of 1990,

despite the fact that neither held a valid Class II medical. certificate Lawrence Driscoll, an agency expert on the purpose and requirements of the new APPM position, explained that a waiver was granted to Mr. Kleimenhagen on January 10, 1991, for a period of one year, during which "the impact of using an APPM without a medical certificate" was to be evaluated, "including the effect on Mr. Kleimenhagen's performance." *Id.*, at 16. The letter granting that waiver stated that

> "an extension of the waiver could be requested after the first year, and explained that the agency was particularly concerned with how the full range of job functions will be accomplished by the district office, including the certification tasks assigned. Based on the modification to the position description which is necessary, you will also need to modify the standardized performance standards."

Clearly, then, as noted in the initial decision, the agency was willing and able to explore the feasibility of allowing a former APS to perform as an APPM with a waiver of that position's medical requirements -- with no absolute limit on its duration -- and even of modifying the position's performance standards, if necessary, to facilitate such a waiver. Because it had shown no valid management reason why it did not, or could not, do so in the appellant's case, or that this proposed accommodation would impose an undue hardship on its operations, I concluded that the agency had made no effort whatsoever to accommodate the appellant's condition to enable him to retain his employment, despite its own policy to do so, and the appellants articulated suggestions. Accordingly, I found that the appellant's removal was the result of prohibited discrimination on the basis of his perceived handicapping condition. *Id.* at 17.

Consequently, I reversed the appellant's removal and ordered agency, upon his reinstatement,

> to make a thorough and bona fide effort to accommodate the appellant's condition and medication. At a minimum, this effort must include an extensive written assessment of the feasibility of placing the appellant in an APPM position with a waiver of the certification requirement, in accordance with the upcoming evaluation
> of such waivers due to be furnished to Mr. Driscoll and others at the end of the first year of Mr. Kleimenhagen's waiver in January of 1992. ... However, the agency's consideration of granting the appellant a waiver of the certification requirement for the APPM position must not exclude its thorough assessment of the feasibility of providing the appellant assistance in performing those specific tasks that actually require him to operate aircraft as pilot-in-charge, the possible elimination of such duties, or other forms of job restructuring, or any other forms of reasonable accommodation. (Emphasis added)

I also noted that, "[i]nasmuch as the agency has argued that he appellant could not perform the essential duties of the APPM position because he lacked a Class II medical certificate, such a determination can only be based on an assessment of the direct relationship between that medical requirement and the appellant's ability to perform the actual work-related duties of the jobs," referring to the requirement, set forth in 5 C.F.R. § 339 204, that an agency waive a medical qualification under certain circumstances. (Emphasis added) See also 5 C.F.R. § 339 102(b). *Id.*, at 18.

The agency did not petition for review of that initial decision, which therefore became a final and enforceable Board decision on January 23, 1991. The agency reinstated the appellant to an Aviation Safety Inspector position, at the same grade and pay he had before his removal, and afforded him back pay, but immediately detailed him to an "unclassified position," with no job description and that the appellant characterizes as principally

clerical duties. *See* Standard Form 50, dated April 8, 1992, MSPB Docket No SF0752910971-C-1, Compliance File, Tab 2, Exhibit 2. It explained to the appellant that he would remain in that detailed position, in which he did not need a medical certificate "until such time as a feasibility determination is completed as to whether he can work as an Accident Prevention Program Manager." *Id., Exhibit 1.*

Pursuant to the appellant's inquiry, the agency submitted its first, two-page, feasibility study on July 9, 1992. On that same day, the appellant filed his first enforcement petition, alleging that the feasibility assessment insufficiently addressed the factors specified in the initial decision, and that the agency had also failed to make the appellant whole with regard to several matters of pay and benefits.[1] During telephone confer noes of October 22 and 23, 1992, the agency agreed to produce a new feasibility study, within 45 days, in order to address more completely and specifically the concerns quoted above. That assessment was to consider, among all other possible forms of accommodation, the possibility of eliminating, shifting, assisting the appellant in the performance of, or otherwise modifying the pilot-in-command responsibilities of the APPM position, in light of the actual proportion of the total duties of that position such responsibilities represent, as documented by data found in time and activity reports from the San Jose District Office, or from a verifiably representative sampling of other district offices nationwide. Initial Decision, dated October 23, 1992. MSPB Docket No SF0752910971-C-1, Compliance File, Tab 12.

On December 7, 1992, the agency issued a second feasibility assessment. Compliance File, Tab 1. The appellant once again petitions for enforcement of the initial decision, arguing that the

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[1] In the instant petition for enforcement, the appellant does not allege that the agency has not since complied with its agreement to resolve the pay and benefits issues mentioned in the first compliance initial decision, and I do not address them here.

second feasibility assessment inadequately addresses the requirements of that decision, and moving for an order requiring the agency to place him in the APPM position. Compliance File, Tab 3. Further, he alleges reprisal, and moves for an award of compensatory damages under the Civil Rights Act of 1991, Pub. L. 102-166, Section 102, for alleged ongoing intentional handicap discrimination by the agency. Compliance File, Tab 5.

ANALYSIS AND FINDINGS

Throughout his appeal, the appellant articulated at least five different potential forms of accommodation for the agency's consideration, in addition to the suggestion that he be accommodated simply by waiving the APPM position's requirement of a valid Class II airman's medical certificate. In the agency's second feasibility assessment, David C Gillion, Manager of the Flight Standards Division, addresses only two of the Suggested forms of accommodation. Further, despite the clear emphasis, in both the original initial decision on the merits and the first initial decision on compliance, that the agency base its feasibility study on an assessment of those specific tasks that actually require him to operate aircraft as pilot-in-command, based on verifiable evidence of the actual proportion of the total duties of that position such responsibilities represent, the agency has not done so, beyond its cursory and unsubstantiated implication that such responsibilities comprise "approximately one-third of the APPM's duties." Compliance File, Tab 1, page 6. Thus, in these two instances alone, the agency has failed to comply with the mandate of the initial decisions.

The most salient shortcoming of the agency's feasibility studies, however, is its failure to determine, as mandated in the initial decision on the merits, the feasibility of placing the appellant in the APPM position with a waiver of the medical certification requirement, in accordance with the evaluation of such waivers that was due to be developed at the end of the first year of Mr. Kleimenhagen's waiver in January of 1992. Neither feasibility study makes any reference whatsoever to such an evaluation having been made, or the results thereof.

The appellant has introduced unrebutted evidence that both Mr. Kleimenhagen, at the Minneapolis Flight Standards Division Office (FSDO), and Mr. Nelson, at the Oklahoma City FSDO, have performed in the APPM position without a valid airman's medical certificate since their conversion from the former APS position in late 1990, that they have done so without performing any pilot-in-command duties, and that they continue to do so *See* affidavits of Mr. Kleimenhagen and Mr. Nelson, dated March 19, 1993; Compliance File, Tab 10. Having thus introduced material evidence that the agency has accommodated other similarly-situated employees, without undue hardship to the agency's operations, the agency bears the burden of coming forward with evidence to rebut the presumption of the reasonableness of that accommodation and its applicability to the appellant. *Savage* v. *Department of the Navy*, 36 M.S.P.R. 148, 152-53 (1988). *See also Brown* v *United States Postal Service*, EEOC No 01851151, 87 Federal Equal Opportunity Reporter 1075 (1987). *See also Prewitt* v. *United States Postal Service*, 662 F 2d 292, 308 (5th Cir. 1981). In its second feasibility study, the agency states that an APPM incumbent "must regularly perform pilot-in-command and crewmember duties," and that in order to do so, must have a valid and current airman's medical certificate. Compliance File, Tab 1, page 2. It also asserts that the placement of a non-flying individual in the APPM position would "fundamentally alter the purpose of" and "seriously impair" the position, and would "seriously undermine the safety of" the National Airspace System. *Id.* The agency also contends that the ability to fly an aircraft is such an "essential requirement" of the APPM position, that its lack on the part of the incumbent would "render... ineffectual" the APPM's role. *Id.*, at 5.

However, it makes no effort to clarify its willingness and ability to accommodate Mr. Kleimenhagen's and Mr. Nelson's failure to hold the requisite medical certificate, apparently without dire consequences or undue hardship, and its refusal to do the same for the appellant's identical "handicap." Nor does it attempt to distinguish their situation from the appellant's in any way.

Rather, despite Mr. Driscoll's testimony at the hearing that the feasibility of waiving the medical certificate requirement would depend in large part on the results of Mr. Kleimenhagen's experiences and performance in 1991, and an order, several subsequent opportunities, to evaluate that feasibility in accordance with those results, the agency has utterly failed to do so. Thus, I find that the agency has failed to rebut the appellant's evidence that waiver of the medical certificate requirement would be a feasible, reasonable and not unduly burdensome accommodation in his case.

The purpose of canceling a removal is to place the employee as nearly as possible in a position that is the same or substantially the equivalent in scope, status, duties and responsibilities as that held before the wrongful discharge. *Kerr* v. *National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984). Reassignment to a new position shortly after reinstating a successful appellant constitutes noncompliance, especially where, as here, the agency has failed to rebut evidence that accommodation in the original position is feasible and reasonable *Ignacio* v. *United States Postal Service*, 35 M.S.P.R. 55, 60 (1987), and cases cited therein. Here, as in *Ignacio*, the wrong committed by the agency was not simply the removal, but the agency's failure to make reasonable accommodation to the appellant's limitations or to show that an accommodation would have created an undue hardship upon its operations. *Id.*, at 65.

The agency has indicated that there is only one APPM position at each FSDO, and that the APPM slot at the San Jose FSDO is currently encumbered by someone else. However, the Board has held that the fact that the agency has filled an appellantís former position does not establish a compelling reason for failing to reinstate the appellant. *Willlams* v. *Department of Health and Human Serves*, 32 M.S.P.R. 259, 261-62 (1987) *See also Taylor* v. *Department of the Treasury*, 43 M.S.P.R. 221, 226-27 (1990); *Mann* v. *Veterans Administration*, 29 M.S.P.R. 271, 275 (1985).

Moreover, as I found in the initial decision on the merits of this appeal, in creating the APPM position, the agency contemplated that all former APS incumbents would be converted to APPMs, unless certain specific procedures were utilized to justify its decision not to do so in a particular case, and that the agency failed to follow those procedures with regard to the appellant. IAF, Tab 17, pages 3-4. Thus, but for the wrongful termination, the appellant would have been converted to the APPM slot; the fact that the APS position from which the appellant was removed no longer exists in its old form is therefore not a bar to his reinstatement in the APPM job. *Taylor*, 43 M.S.P.R. at 225-26.

Based on all of the foregoing, I find that, having failed to waive the medical certificate requirement and to place the appellant in, and accommodate his performance of the duties of, an APPM position at the San Jose FSDO, the agency has failed to meet its burden of showing that it has complied with the initial decision of December 19, 1991. 5 C.F.R. § 339.204 ("Agencies must waive a medical standard or physical requirement...when there is sufficient evidence that an...employee, with or without reasonable accommodation, can perform the essential duties of the position without endangering the health and safety of the individual or others.").

The Appellant's Allegation of Reprisal

The appellant contends that the agency has subjected him to reprisal for having prevailed on his claim of handicap discrimination in his original appeal on the merits of his removal. The Board is authorized to examine such a claim in a compliance case, because an employee who is being retaliated against for having filed a successful appeal cannot be deemed to have been returned to the status quo ante. *Baughman* v. *Department of the Army*, 45 M.S.P.R. 580, 587 (1990); *Gaydon* v. *United States Postal Service*, 37 M.S.P.R. 276, 279 (1988).

To establish a claim of reprisal for protected activity in violation of 5 U.S.C. § 2302(b), the proponent must show, by

preponderant evidence, that (1) He engaged in the protected activity; (2) the accused official knew of that activity; (3) the action under review could, under the circumstances, have been retaliation; and (4) there was a genuine nexus between the retaliation and the agency's action *See Warren* v. *Department of the Army*, 804 F.2d 654, 656-58 (Fed. Cir. 1986). As part of his burden of proving a causal connection between the protected activity and the action, the appellant must also prove that the retaliatory motive was a significant or substantial factor in the taking of the action. *See Gerlach* v *F.T.C.*, 9 M.S.P.R. 268, 275-76 (1981), citing *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 285-86 (1977). *See also Baughman*, 45 M.S.P.R. at 580.

Here, it is undisputed that the appellant engaged in a protected activity, that the agency officials responsible for detailing the appellant and issuing the feasibility studies were aware of his successful appeal, and that the agency's ultimate failure to accommodate him in the APPM position, under the circumstances, could have been retaliation. The appellant, however, also argues that he would not have been detailed, to an "unclassified position performing menial tasks of a clerical nature" but for his having prevailed on his handicap discrimination claim. Compliance File, Tab 5, page 17.

Because of the peculiar factual situation in this case, the remedial order in the initial decision was inevitably unusual. Possession of a Class II medical certificate is clearly a requirement of the APPM position, as it was not for the APS slot, and the appellant's reinstatement was thus necessarily conditional upon the agency's assessment of the feasibility of waiving that requirement. Until that assessment was made, the appellant was permissibly placed in another position, at the same grade and pay. Had the appellant's wrongful termination not occurred, he would not necessarily have been converted immediately into the APPM position, inasmuch as the agency wished to assess the feasibility of waiver, using Mr. Kleimenhagen's situation as a sort of test case.

The appellant further contends that, but for his successful appeal, "the agency would have addressed [his] proposed accommodations in a good faith manner...." On the contrary, had the agency sufficiently addressed all potential forms of accommodation originally, the appellant would not have prevailed in his appeal. Moreover, had he not prevailed, the agency would not have been required to make further efforts to accommodate him. The fact that its efforts to comply fell short does not, by itself, establish reprisal, and the appellant has shown no additional evidence that retaliation was a significant or substantial motivating factor in the agency's ultimate failure to comply in this case. Thus, I find that the appellant has not met his burden of proof on this affirmative defense. *See Baughman*, 45 M.S.P.R. at 580.

Compensatory Damages Under the Civil Rights Act of 1991

In response to the appellant's motion for an award of such damages, the agency argues that, because the Civil Rights Act of 1991 became effective on November 21, 1991, and the appellant's appeal in this case was based on actions occurring before that date, the Act's provisions do not apply to this case. I agree.

Generally, the United States Supreme Court has followed the principle that legislation is not retroactive unless Congress specifies otherwise. *See, e.g., Bowen* v *Grorgetown University Hospital*, 488 U.S. 204 (1988). *See also* the Bureau of National Affairs' (BNA) discussion of the Act's retroactivity in the BNA Daily Labor Report of December 11, 1991 (No 238), pages C-1 and C-2. The Act itself, in section 402(a), provides that, "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment," which was on November 21, 1991. The Act is silent on the specific issue of retroactivity of the compensatory damages provision.

Further, while acknowledging that "the issue of whether the damages provisions in the new Act should be applied retroactively

is much in question," the Equal Employment Opportunity Commission (EEOC) has stated that it will follow the dictates of the Supreme Court's *Bowen* decision, and will not seek damages in charges filed prior to the enactment of the Act, or in post-Act charges that challenge pre-Act conduct. *See* EEOC Notice 915.002, "Policy Guidance on Application of Damages Provisions of the Civil Rights Act of 1991 to Pending Charges and Pre-Act Conduct," dated December 27, 1991.

Further, while the appellant contends that he is seeking compensatory damages only for continuing handicap discrimination visited upon his since the date of the initial decision on the merits -- December 19, 1991 -- the damages provisions of the Act need not be retroactive in order to apply. However, the handicap discrimination that the agency was found to have committed occurred in the period up to and including the date of his wrongful termination on April 5, 1991, before the Act's effective date.

Compliance proceedings are an addendum to the initial decision on the merits, and not a reconsideration of the evidence in a new light. *Armstrong* v. *Office of Personnel Management*, 37 M.S.P.R. 129, 131 (1988); *Ferry* v. *Department of the Navy*, 32 M.S.P.R. 63, 65 (1986). While a discrimination claim may be raised for the first time in the context of an enforcement petition, the agency's failure to comply, in part, with an initial decision finding discrimination does not, per se, constitute a separate or different act of discrimination. *Bergman* v. *Department of Justice*, 56 M.S.P.R. 42, 45 (1992). Further, the appellant has shown no evidence that the agency's partially unsuccessful compliance efforts constituted not only severable, but also intentional acts of discrimination, which is a prerequisite for an award of damages under Section 102 of the Act.

Based on the foregoing, the appellant's motion for an award of damages is DISMISSED.[2]

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[2] In light of this ruling, the appellant's request for a hering on the appropriate amount of compensatory damages is denied.

CONCLUSION

The appellant's motion for enforcement is GRANTED. The Board's enforcement power is continuing in nature; thus, the appellant may file another petition for enforcement if he believes that subsequent agency actions evidence non-compliance with the initial decision *Swafford* v. *Tennessee Valley Authority*, 26 M.S.P.R. 680, 682 (1985).

RECOMMENDATION

In order for the agency to be in compliance with the initial decision, it must place the appellant in an Accident Prevention Program Manager position, at the same grade and pay, at the San Jose Flight Standards Division Office. Upon reinstatement to that position, the Agency must take whatever actions are necessary in order to accommodate him in the performance of the duties of that position, as it has the similarly-situated Messrs. Kleimenhagen and Nelson.

FOR THE BOARD: s/ A. L. Ellison
Anthony L Ellison
Administrative Judge

NOTICE TO THE PARTIES

If the agency agrees to take all of the recommended actions, it must, no later than 15 calendar days after the date of this recommendation, file evidence that it has taken those actions with the Clerk of the Board.

If the agency refuses to take any of the recommended actions, it must, no later than 30 calendar days after the date of this recommendation, file both evidence of the actions it has taken and a brief supporting its disagreement as to those actions it has not taken with the Clerk of the Board.

If the agency refuses to take all of the recommended actions, it must, no later than 30 calendar days after the date of this recommendation, file a brief supporting its disagreement with the Clerk of the Board.

Appellant may file a response to any agency brief or evidence of compliance no later than 20 calendar days after the date shown on the agency's certificate of service. Appellant's brief may contain a request that the Board review any finding of agency compliance

The address of the Clerk of the Board is:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW , Suite 802
Washington, DC 20419

Any submission to the Board that lacks a statement that the submission has either been mailed or hand-delivered to the opposing party will be rejected and returned.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JACK HILTON HOCKER, Appellant, v. DEPARTMENT OF TRANSPORTATION, Agency.	)	DOCKET NUMBER SF07529110971-I-1 [1] DATE: JULY 12, 1994

Raymond Laing, Esq., Law Offices of David S. Handsher, San Francisco, California, for the appellant

Carmen Zervigon, Esq., Los Angeles, California, for the agency.

BEFORE

Ben L Erdreich, Chairman
Jessica L Parks, Vice Chairman
Antonio C Amador, Member

OPINION AND ORDER

The appellant filed a petition for enforcement alleging that the agency failed to comply with the terms of the Board's final order

[1] The docket number below was SF0752910971-C-2

in his appeal and sought an award of compensatory damages pursuant to the Civil Rights Act of 1991. In a Recommendation, the MSPB administrative judge recommended that the Board find the agency in noncompliance with the Board's order, but did not award the appellant compensatory damages. The agency timely filed evidence of compliance with the Recommendation. The appellant filed a submission in response to the Recommendation, [2] and the agency replied. We hereby find the agency in partial COMPLIANCE with the Board's order, and we REMAND the petition for enforcement for adjudication consistent with this Opinion and Order.

BACKGROUND

The appellant was employed as an Accident Prevention Specialist (APS) in the agency's San Jose Flight Standards District Office. In 1990, following an extensive System Safety and Efficiency Review, the agency decided to convert its APS positions to Accident Prevention Program Manager (APPM) positions by adding additional responsibilities and requirements to the position description. One new requirement was possession of a valid Class II airman's medical certificate. The appellant could not obtain this medical certificate because of the effects of medication he took for his heart condition. This lack of medical certification prevented the appellant from performing pilot-in-command duties required by the APPM position.

The agency removed the appellant for failing to meet the medical requirements of his position based on his lack of a

[2] Petitioner titled this submission a petition for review. Because the Board's regulations do not provide for the filing of a petition for review of a Recommendation, we will construe this submission as a brief that responds to the agency's evidence of compliance and that asks the Board to review findings in the Recommendation pursuant to 5 C.F.R. § 1201.183 (a) (7) (1993).

medical certificate. While the agency had announced procedures for the conversion of employees from the APS position to the APPM position, including a procedure for requesting a waiver of the medical certificate, the agency did not follow those procedures in regard to the appellant. The agency had granted a temporary waiver of the medical certificate requirement to another employee, Mr. Kleimenhagen. The agency planned to evaluate Mr. Kleimenhagen's performance after one year to assess the feasibility of waiving the Medical certificate requirement for other employees.

In an initial decision, the administrative judge reversed the agency's action removing the appellant from his APS position. The administrative judge found that the agency committed unlawful discrimination based upon the appellant's handicapping condition by: (1) improperly removing the appellant from his APS position for failing to hold a medical certificate that was not required by that position; (2) failing to follow its own mandatory procedures for justifying and obtaining approval for its failure to convert the appellant from the APS to an APPM position; and (3) failing its obligation to make a meaningful attempt to accommodate the appellant's condition underlying its stated reason for his removal. Initial Decision, MSPB Docket No SF0752910971-I-1, slip op at 17-18 (Dec. 19, 1991) (hereinafter ID). The administrative judge ordered the agency to reinstate the appellant and to:

> make a thorough and bona fide effort to accommodate the appellant's condition and medication. At a minimum, this effort must include an extensive written assessment of the feasibility of placing the appellant in an APPM position with a waiver of the certification requirement, in accordance with the upcoming evaluation of such waivers due to be furnished toMr. Driscoll and others at the end of the first year of Mr. Kleimenhagen's waiver in January of 1992. However, the agency's consideration of granting the appellant a waiver of the certification requirement for the

> APPM position must not exclude its thorough assessment of the feasibility of providing the appellant assistance in performing those specific tasks that actually require him to operate an aircraft as pilot-in-charge, the possible elimination of such duties, or other forms of job restructuring, or any other forms of reasonable accommodation.

Id. at 18 (footnote and citation omitted). The administrative judge noted that a determination that the appellant could not perform the essential duties of the APPM position without the medical certificate must be based on "an assessment of the direct relationship between the medical requirement and the appellant's ability to perform the actual work-related duties of the job." *Id.* at 18 n 10. Neither party filed a petition for review, and the initial decision became the final decision of the Board on January 23, 1992.

The agency placed the appellant back on the rolls. However, because it had abolished the APS position and the appellant did not hold the medical certificate required by the APPM position, the agency reassigned the appellant to an unclassified position in the same series as the APS and APPM positions pending completion of the feasibility study ordered by the administrative judge. Recommended Decision (RD) at 4. The appellant characterizes his duties in the unclassified position as principally clerical. *Id.*

The agency produced a two-page feasibility assessment on July 9, 1992, and the appellant promptly filed a petition for enforcement. The parties orally settled the petition for enforcement during telephone conferences. The parties agreed that the agency would produce a new feasibility study within 45 days to more completely and specifically address the concerns voiced in the initial decision. Initial Decision, MSPB Docket No. SF0752910971-C-1 (Oct. 23, 1992). The administrative judge instructed the agency to consider in the assessment:

among all other possible forms of accommodation, the possibility of eliminating, shifting, assisting the appellant in the performance of, or otherwise modifying the pilot-in-command responsibilities of the APPM position, in light of the actual proportion of the total duties of that

position such responsibilities present, as documented by data found in tine and activity reports from the San Jose District Office, or from a verifiably representative sampling of other district offices nationwide.

Id. at 2-3 (emphasis in original).

On December 7, 1992, the agency produced a second feasibility assessment in which it found it infeasible to employ the appellant in the APPM position without a medical certificate. The appellant filed a second petition for enforcement arguing that the second feasibility assessment failed to adequately address the requirements of the initial decision on the merits. The appellant requested that the administrative judge issue an order requiring the agency to place the appellant in the APPM position. The appellant claimed that the agency's continued failure to comply with the Board's order constituted reprisal for his successful appeal and further discrimination based on his handicapping condition. The appellant moved for an award of compensatory damages under the Civil Rights Act of 1991, 42 U.S.C. § 1981a(a)(2) (Supp. IV 1992) (CRA), based on this alleged discrimination.

In a Recommendation issued on April 16, 1993, the administrative judge recommended that the Board find the agency in noncompliance with the Boards final order. The administrative judge found that the agency's second feasibility assessment failed to meet the requirements of the Board's order because: (1) the assessment did not determine the feasibility of placing the appellant in the APPM position with a waiver of the medical certificate requirement in accordance with the evaluation of such waivers the agency was supposed to have completed based on Mr.

Kleimenhagen's experience; (2) the assessment did not address all the forms of accommodation suggested by the appellant; and (3) the agency did not base the assessment on the specific tasks that actually require the appellant to operate an aircraft as pilot-in-command, based on verifiable evidence of the actual proportion of the total duties of the APPM position such duties represent. RD at 5-6. The administrative judge further found that the appellant introduced evidence that the agency had allowed two other employees who lacked medical certificates to occupy the APPM position without undue hardship to the agency's operations, and that the agency failed to come forward with rebuttal evidence or to distinguish the appellant from those employees. RD at 6. The administrative judge determined that the agency's detail of the appellant to the unclassified position constituted noncompliance with the Board's order and a failure to provide a reasonable accommodation for the appellant's handicapping condition. RD at 7-8. The administrative judge advised the agency that to be in compliance with the Board's order it must place the appellant in the APPM position and make whatever actions are necessary to accommodate the appellant in that position as it has for the two similarly-situated employees. RD at 12-13.

The administrative judge determined, however, that the agency's failure to comply with the Board's order did not constitute reprisal for the appellant's successful appeal. The administrative judge found that the appellant failed to establish a nexus between his successful appeal and the agency's failure to comply with the Board's order.

The administrative judge also denied the appellant's request for compensatory damages. The administrative judge first ruled that the appellant was not entitled to compensatory damages for the discrimination found in the Board's decision on the merits because (1) the CRA should not be applied retroactively; and (2) the Board does not reexamine the evidence on the merits in a petition for enforcement. The administrative judge held that the appellant had not demonstrated that the agency's failure to comply with the Board's order constituted a separate, intentional act of appellant

had not demonstrated that the agency's failure to comply with the Board's order constituted a separate, intentional act of discrimination, and that therefore the appellant had not shown an entitlement to damages based on the agency's failure to comply.

On April 30 and May 10, 1993, the agency submitted evidence that it placed the appellant in the APPM position at the same grade and pay.

ANALYSIS

The appellant's reassignment to the APPM position.

The agency has submitted documents showing that it reassigned the appellant to the APPM position at the same grade and pay effective April 29, 1993. Compliant file, tabs 1 and 2. The appellant neither challenges the sufficiency of the agency's evidence nor argues that the agency is still in noncompliance with the Board's final order. Compliance file, tab 3. Accordingly, we find the agency has now complied with the order to assign the appellant to the APPM position.

The appellant's claim for compensatory damages under the Civil Rights Act of 1991.

The appellant challenges the administrative judge's refusal to award compensatory damages under the CRA for the agency's failure to comply with the Board's order from the date of the initial decision on the merits, December 19, 1991, until the date the agency submitted evidence of compliance May 10, 1993. The appellant argues that the administrative judge erred in: (1) determining that the CRA would not be applied retroactively; (2) placing the burden of showing intentional discrimination on the appellant rather than requiring the agency to establish that it made a good faith effort to reasonably accommodate him; (3) determining that the appellant must show a severable act of discrimination after the initial decision on the merits in order to

obtain relief under the CRA; and (4) finding that the agency's failure to place appellant in the APPM position after the initial decision did not constitute intentional discrimination based on his handicapping condition.

In the CRA, Congress amended Title VII of the Civil Rights Act of 1964 as follows to provide for awards of compensatory and punitive damages.

> (2) Disability. In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12117(a)) and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its desperate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation...against an individual, the complaining party may recover compensatory and punitive damages... in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.
>
> (3) Reasonable accommodation and good faith effort. In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is

needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

42 U.S.C. § 1981a (a)(2)-(3) (Supp IV 1992). Compensatory damages contemplated by Congress in enacting the CRA include "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses . . . ." 42 U.S.C. § 1981a (b)(3).

The Equal Employment Opportunity Commission (EEOC) has ruled that the CRA permits an award of compensatory damages to federal sector complainants in the administrative process. *Jackson v. United States Postal Service* , EEOC No 01923399, slip op. at 2-3 (Nov. 12, 1992).[3] Under the principles established in *Ignacio v. United States Postal Service*, 30 M.S.P.R. 471, 486 (Spec. Pan. 1986), the Board defers to the EEOC's interpretation of discrimination laws.

Accordingly, we hold that an appellant who prevails in an appeal before the Board based on a finding of discrimination may recover compensatory damages from an agency pursuant to the CRA.

A The appellant must show an act of discrimination separate from the act of discrimination that is the basis for the Board's final decision on the merits of the appeal in order to recover compensatory damages in his petition for enforcement.

The appellant argues that the Board should apply the CRA retroactively to permit an award of compensatory damages in a

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[3] The CRA does not provide for an award of punitive damages against a government agency 42 U.S.C. § 1981a (b)(1) (Supp. IV 1992).

proceeding that was pending on the effective date of the CRA, November 21, 1991. However, the Supreme Court has held that compensatory damages may not be awarded under the CRA in actions that were pending on the effective date of the CRA. Landgraf v. USI Film Products, 114 S. Ct. 1483, 1505 (1994). Therefore, the appellant's request for retroactive application of the CRA is denied.

The administrative judge properly required the appellant to establish a separate incident of discrimination after the initial decision in order to recover damages in his petition for enforcement. The Board will not reconsider the merits of an appeal in an enforcement proceeding. *See Armstrong v. Office of Personnel Management,* 37 M.S.P.R. 129, 131 (1988) (a compliance proceeding is an addendum to the decision on the merits, not a reconsideration of the evidence in a new light). Accordingly, where the Board has found discrimination in a final decision on the merits of an appeal, an appellant may not seek compensatory damages based on that finding of discrimination for the first time in a petition for enforcement. The appellant must seek such damages from the administrative judge during the appeal on the merits. However, an appellant may raise handicap discrimination for the first time in a petition for enforcement where the issue is relevant to a specific compliance issue. *Bergman v. Department of Justice*, 56 M.S.P.R. 42, 45 (1992). Thus, in a petition for enforcement, an appellant may obtain compensatory damages if the agency's failure to comply with the Board's final order constitutes a separate act of discrimination.

We find that the agency's failure to comply with the Board's final order constituted a separate act of discrimination from that found in the initial decision. In the final decision on the merits, the administrative judge reversed the appellants removal based on a finding of handicap discrimination, both by intentional discrimination and by its failure to provide reasonable accommodation. The administrative judge found that the agency failed to reasonably accommodate the appellant's handicapping

condition because the agency did not follow its own procedures for seeking a waiver of the medical certificate, and it did not consider any method of accommodating the appellant's condition. The administrative judge ordered the agency to reverse the removal, reinstate the appellant, and conduct the feasibility study to determine whether the appellant could be reasonably accommodated in the APPM position.

In the Recommendation, the administrative judge found that the agency's feasibility study, which concluded that the appellant could not be reasonably accommodated in the position, was insufficient. He found that the deficient feasibility study represented a failure to reasonably accommodate the appellant's handicapping condition principally because it did not distinguish the appellants case from those of similarly situated employees whom the agency had accommodated without undue difficulty. RD at 8. This failure is separate from the failure to reasonably accommodate that served as part of the basis for the administrative judge's finding in the appeal on the merits.[4] Accordingly, we reverse the administrative judge's finding to the contrary.

B The appellant may not recover compensatory damages for the agency actions that served as the basis for his first petition for enforcement.

The appellant filed a petition for enforcement when the agency issued its first feasibility assessment. In that petition he did not seek compensatory damages under the CRA for the agency's failure to comply with the Board's order. *See* Compliance file, Docket No SF0752910971-C-1, tab 1. The appellant and the agency entered into an agreement in which the

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[4] We note, however, that a failure to comply with a final Board order finding discrimination does not per se constitute an incident of discrimination.

agency agreed to produce a second feasibility assessment within 45 days and the appellant agreed that his petition for enforcement would be dismissed as moot. Initial Decision, MSPB Docket No SF0752910971-C-1, slip op. at 2-3 (Oct. 23, 1992). The decision dismissing the petition as moot became final on November 27, 1992. Accordingly, the appellant may not recover compensatory damages for the agency's actions that served as the basis for the first petition for enforcement. *See Wexler v. Department of the Interior*, 48 M.S.P.R. 513, 517-18 (1991), *aff'd*, 954 F.2d 733 (Fed. Cir. 1992) (Table) (a final decision precludes relitigation of issues that were raised and that could have been raised in that proceeding); *Jackson v. United States Postal Service*, 45 M.S.P.R. 560, 563 (1990) (a final decision on an appellant's petition for enforcement does not preclude the appellant from filing additional petitions predicated on subsequent agency actions evidencing noncompliance).

C The appellant did not have to demonstrate that the agency's failure to reasonably accommodate his handicapping condition constitutes intentional discrimination in order to obtain compensatory damages.

The Administrative judge erred in requiring the appellant to prove intentional discrimination by the agency in order to prove entitlement to compensatory damages after he found that the agency failed to provide reasonable accommodation for the appellant's handicapping condition. The CRA provides that in

> an action brought . . . against a respondent who engaged in unlawful intentional discrimination . . . *or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation* . . . the complaining party may recover compensatory damages . . .

42 U.S.C. § 1981a (a)(2) (emphasis added). Thus, the plain language of the CRA permits an appellant to recover compensatory damages upon a showing of either intentional handicap discrimination or a failure to provide reasonable accommodation.

However, the statute further provides that in cases involving a failure to reasonably accommodate an employee's handicapping condition,

> damages say not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation...

42 U.S.C.S. 1981a (a)(3). Thus, once an appellant has proved by a

preponderance of the evidence that the agency has committed handicap discrimination by failing to provide reasonable accommodation, the agency may avoid liability for compensatory damages by demonstrating that it made a good faith effort to accommodate the appellant's handicapping condition. The agency's good faith effort claim is akin to an affirmative defense, and the agency bears the ultimate burden of persuasion on the issue. *See* 42 U.S.C. § 2000e(m) (Supp. V 1993) (in Title VII actions, the term "demonstrates" means "meets the burdens of production and persuasion"); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989).

The administrative judge found that the appellant proved by a preponderance of the evidence that the agency failed to reasonably accommodate his condition. Therefore, the appellant made out a prima facile case of entitlement to compensatory damages under the CRA. *See* 42 U.S.C. § 1981a (a)(2). The burden of proof shifted to the agency to show that it made a good faith effort to reasonably accommodate the appellant's handicapping condition

in a manner that "would provide [the appellant] with an equally effective opportunity and would not cause an undue hardship on the operation of the [agency]." 42 U.S.C. § 1981a (a)(3). The administrative judge erred by requiring the appellant to demonstrate that the agency committed intentional discrimination and by failing to require the agency to demonstrate that it made a good faith effort to accommodate the appellant's condition. Accordingly, remand is necessary.

The appellant's claim that the agency's failure to comply constituted reprisal for his successful appeal.

The appellant urges us to reverse the administrative judge's finding that the agency's failure to comply with the final order on the merits and detailing him to an unclassified position did not constitute reprisal for filing a protected grievance under 5 U.S.C. § 2302 (b)(9). The appellant's argument amounts to nothing more than mere disagreement with the administrative judge's finding that no nexus exists between the agency's failure to comply and the appellant's successful appeal. We find no basis to disturb the administrative judge's findings on this issue. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133-34 (1980), *aff'd*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

ORDER

Accordingly, we REMAND this petition for enforcement to the San Francisco Regional Office for further proceedings consistent with this Opinion and Order. If the administrative judge finds that the agency did not make a good faith effort to reasonably accommodate the appellant's handicapping condition,

he shall afford the parties an opportunity to present additional evidence and argument concerning the amount of compensatory damages due the appellant.

FOR THE BOARD:

s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, DC

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

JACK H HOCKER, Appellant,	)	DOCKET NUMBER SF-0752-91-0971-B-1
v.	)	
DEPARTMENT OF TRANSPORTATION, Agency	)	DATE: SEPTEMBER 26, 1994

Raymond W Laing, Esquire, Law Offices of David S. Handsher, San Francisco, California, for the appellant

Carmen Zervigon, Esquire, Los Angeles, California, for the agency

BEFORE

Anthony L Ellison
Administrative Judge

INITIAL DECISION

This case is before the San Francisco Regional Office of the Board upon remand by the full Board, by Opinion and Order dated July 14, 1994, of a Recommended Decision finding the agency in noncompliance with a previous initial decision. The Board has jurisdiction over the appeal under 5 U.S.C. § 7701(a).

The parties have now informed the Board that they have reached a settlement agreement resolving this matter. The agreement provides that the appellant will withdraw his petition for enforcement. It also provides that the settlement agreement is to be incorporated into the Board's record for enforcement purposes. I have reviewed the agreement and find that it is lawful on its face, that it appears to have been freely reached by the parties, and that the parties understand its terms.

The Board has previously recognized that settlements in civil actions "serve to avoid unnecessary litigation and to encourage fair and speedy resolution of issues." *Richardson v. Environmental Protection Agency*, 5 M.S.P.R.. 248, 250 (1981), *modified, Shaw v. Department or the Navy*, 39 M.S.P.R. 586 (1989). In view of the fact that the parties have agreed to a settlement of this appeal, the appeal is dismissed. The Board retains jurisdiction to enforce the agreement.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: s/ A. L. Ellison
Anthony L. Allison
Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the Administrative Judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112 (a)(5).

NOTICE TO APPELLANT

This initial decision will become final on October 31, 1994 unless a petition for review is filed by that date or the Board

reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review if you believe that the settlement agreement is unlawful, was involuntary, or was the result of fraud or mutual mistake. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW , Suite 802
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the Administrative Judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

ENFORCEMENT

If the settlement agreement has been made part of the record, and the agency has not fully complied with the terms of the agreement after this initial decision has become final, you may ask the Board to enforce the settlement agreement by filing a motion with this office.

NOTICE TO AGENCY / INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

JACK HILTON HOCKER, Appellant,	)	Docket No. SF0752910971B1
v.	)	Date: September 27, 1994
DEPARTMENT OF TRANSPORTATION, Agency.	)	

SETTLEMENT AGREEMENT

In consideration of the promises set forth herein, the parties to this agreement resolve to settle the above referenced appeal as follows:

1) This agreement will be entered into the record of this proceeding before the Merit Systems Protection Board for purposes of enforcement.
2) Appellant agrees to withdraw the above-captioned appeal in its entirety and hereby waives all claims, all rights to further administrative proceedings, and all rights to file a civil action against the United States Department of Transportation which arises out of Appellant's Motion for Enforcement of Board's Order, dated January 7, 1993, except as may be necessary to enforce the terms of this agreement.
3) In consideration of Appellant's withdrawal of the above-captioned appeal, the agency agrees to pay Appellant the sum of $90,000 compensatory damages for pain and suffering. This amount will be paid without any payroll or other deductions.

4) In further consideration Appellant's withdrawal of the above-captioned appeal, the agency agrees to pay Appellant's reasonable attorney fees and costs in the amount of $13,000 and to make its check payable for said fees to Law Offices of David S. Handsher, IRS No. 500-52-8452.

s/ Carmen Zervigon
For the Agency

Sept. 29, 1994
Date

s/ Raymond W. Laing
Appellant's Representative

Sept. 27, 1994
Date

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition with appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

95-3155

JACK H. HOCKER,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

DECIDED: August 14, 1995

Before RICH, Circuit Judge, COWEN, Senior Circuit Judge, and PLAGER, Circuit Judge.

PER CURIAM.

DECISION

Jack H. Hocker (Hocker) seeks review of the September 26, 1994 initial decision of the Merit Systems Protection Board's (Board) Administrative Judge (AJ), Docket No. SF-0752-91-0971-B-1, dismissing Hocker's appeal based on a settlement

agreement reached between Hocker and the Department of Transportation (agency). The AJ's decision became the final decision of the Board on October 31, 1994 when neither party petitioned for review. We affirm.

DISCUSSION

I. Background

This case began in 1991 when Hocker appealed his removal from the position of Aviation Safety Inspector by the Federal Aviation Administration. The removal was reversed based on a finding of handicap discrimination in an initial decision which became a final Board decision on January 23, 1992. In that decision, the Board ordered the agency to "make a thorough and bona fide effort to accommodate the appellant's condition and medication" including "an extensive written assessment of the feasibility of placing the appellant in an APPM [Accident Prevention Program Manager] position with a waiver of the certification requirement."

Subsequently, Hocker filed two separate petitions to enforce that decision, the second dated January 7, 1993, arguing that the feasibility assessments produced by the agency inadequately addressed the requirements of the decision. Hocker additionally alleged reprisal and moved for an award of compensatory damages under the Civil Rights Act of 1991.

In response to the second petition, the Board issued an Opinion and Order on July 12, 1994 (July Opinion). The July Opinion upheld the AJ's April 16, 1993 recommended decision finding no reprisal, and reversed in part finding that Hocker may be entitled to compensatory damages for discrimination which occurred after enactment of the Civil Rights Act of 1991. The case was remanded to the regional office for further proceedings. Subsequently, on September 26, 1994, the AJ issued an initial decision dismissing Hocker's appeal based on a settlement agreement entered into between the parties.

II. Standard of Review

Title 5, section 7703, of the United States Code strictly limits and defines our review of Board decisions. We must affirm the Board's decision unless it is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (2) obtained without procedures required by law, rule, or regulation having been followed; or
> (3) unsupported by substantial evidence.

5 U.S.C. § 7703(c) (1988).

A settlement agreement is a contract. Thus, interpretation of its terms is a question of law which we review de novo. Greco v. Department of the Army, 852 F.2d 558, 560 (Fed. Cir. 1988).

III. Analysis

In this appeal, Hocker seeks review of the July Opinion, specifically with respect to the reprisal and compensatory damages issues addressed there. In fact, in his reply brief, Hocker asserts that "[t]he issue of this petition is not that the Board abused its discretion in dismissing the petitioner's petition for enforcement but that the Board's July Opinion is insufficient." (emphasis in original)

Hocker, however, ignores the effect of the settlement agreement he entered into with the agency. "Settlement agreements, like all contracts, should be interpreted to carry out the parties' collective intent. Here the intent was to end the dispute." Greco, 852 F.2d at 561. Indeed the settlement agreement at issue states:

> Appellant agrees to withdraw the above-captioned appeal in its entirety and hereby waives all claims, all rights to further administrative proceedings, and all rights to file a civil action against the United States Department of Transportation which arise out of Appellant's Motion for Enforcement of Board's Order, dated January 7, 1993,

except as may be necessary to enforce the terms of this agreement.

The July Opinion was a direct result of Hocker's January 7, 1993 Motion for Enforcement of Board's Order. The very terms of the settlement agreement therefore explicitly preclude any further claim Hocker may have had with respect to the July Opinion.[1]

Additionally, Hocker does not allege that the settlement agreement "is tainted with invalidity, either by fraud practiced upon him or by mutual mistake under which both parties acted." Callen v. Pennsylvania R.R. Co., 332 U.S. 625, 630 (1948). Absent such proof, the settlement agreement is binding on the parties. Accordingly, the Board's dismissal of Hocker's appeal based on the settlement agreement must be affirmed.

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[1] As we find that the settlement agreement precludes Hocker's appeal, we need not address the finality of the July Opinion or the timeliness of Hocker's appeal, issues raised by the government.

CERTIFICATE OF SERVVICE

I certify that the attached documents, "PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT" was sent by United States Postal Service, Overnite Priority Mail, this day to each of the following:

Clerk of the Court
Supreme Court of the United States
1 First Street, N. E.
Washington, DC 20543
[original Petition and thirty nine (39) copies]

Timothy B. Walthall
Department of Justice
550-11th Street, N.W., Rm. 9210
Washington, DC 20530
[three (3) copies]

Solicitor General of the United States
Room 5614
Department of Justice
10th Street and Constitution Ave., N.W.
Washington, DC 20530
[three (3) copies]

Date: December 11, 1995

Jack H. Hocker

Jack H. Hocker, *pro se*

1106 Starwood Court
San Jose, CA 95120-1759